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SUPREME COURT, U.S.

No. 81 6629

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

VLADIMIR N. ETLIN

APPELLANT

v.

CHARLES ROBB (GOVERNOR OF VIRGINIA)

GERALD BALES (ATTORNEY GENERAL OF VIRGINIA)

LEWIS H. GRIFFITH (JUDGE)

APPELLES

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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CHARLES ROBB

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APPELLEES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Appellant, Vladimir H. Etlin, pro se, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit entered on December 30, 1981 denying Appellant's request for declaratory judgement and preliminary and permanent injunctive relief, enjoining enforcement of the order of the Circuit Court of Fairfax County, in which Appellant's Fifth, Thirteenth and Fourteen Amendment rights were violated, and request for damages as well.

OPINION BELOW

The Court of Appeals entered its decision (App. 1) on December 30, 1981 affirming of the District Court decision (App.2) to abstain from hearing of the matters raised by the Appellant. The Appellant's petition for rehearing (App. 3) was denied by the Court of Appeals (App. 4) on February 2, 1982.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The United States Constitution, Amendment I:

> Congress shall make no law ... prohibiting the free exercise thereof; ... to petition the Government for a redress of grievances.

Amendment V:

> ... nor shall any person ... be deprived of life, liberty, or property, without due process of law...

Amendment XIII:

> Neither slavery nor involuntary servitude, ... shall exist within the United States,...

Amendment XIV:

> ... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.

While there is still reason to believe that positive, nurturing parent-child relationships exist, the parents partial interest favors preservation, not severance, of natural familiar bonds. Soc. Serv. Law #384-b.1. (a) (ii)

JURISDICTION

On February 2, 1982 the Court of Appeals denied the Appellant's petition for rehearing. (App. 4) This Court jurisdiction is invoked under Title 28 United States Code, Section 1343 (3); 2201, 2202; Title 42 United States Code, Section 1983 and that the Court of Appeals has refused to decide an important federal questions in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

In October 1979, Appellant's wife, Michell M. Etlin, willfully deserted and abandoned Appellant, leaving the parties home with their son without any just cause or excuse.

In February 1980, Appellant started to pay voluntarily to the Appellant's wife $200.00 per month as child support for his minor son, Daniel Etlin, born January 20, 1978.

Conceeding to the futility of getting custody by a father in the Virginia courts (especially when both parents are fit) Appellant offered some compromise solutions to his wife on several occassions: a joint custody, which would preserve both parents parental rights, or less desirable, custody to his wife if at least two evenings a week, every other weekend, two months vacation, and some holidays are guaranteed to the Appellant and his son, plus equal participation in decisions concerning his son's development. Appellant's wife has flatly rejected.

In January 1981, a trial was held where permanent custody, child support and counsel fees were decided. Both Appellant's wife and her only witness, Dr. Ganz, lied profusely and committed perjury. Even lying both testified that Appellant loves his son and is a bright person. Appellant's four (4) witnesses, including a physchiatrist, convincingly testified that it is in the best interest of the child, Appellant's son Daniel, to be in

the custody of his father. Moreover, Appellant's witness, Dr. Todhunter, who had been Daniel's pediatrician for 2.5 years, testified that Appellant's wife demonstrated a neurotic preoccupation about her son and that Daniel underwent a deceleration of height and weight growth since he left Appellant's house.

Notwithstanding this fully corroborated evidence as to the Appellant's fitness as a parent and the stark contrast between that evidence and the innuendo-laced, uncorroborated and hearsay evidence submitted by the Appellant's wife and her sole, ill-reputed witness, Dr. Ganz, Appellee Griffith, ignoring the fully corroborated evidence as to Appellant's fitness as a loving and caring parent with the highest education and other things superior to those of his wife, and the stark contrast between Appellant and his wife who committed perjury, lacked stability in place of living, had no steady job, has only a high school education, and has no relatives or friends in the area, did, solely on the basis of illegal and sexist considerations, award custody to the mother. (App. 5) Appellee Griffith has failed to give his comprehensive opinion reflecting a thorough analysis of the presented evidence and specifying the reasons for the ultimate decision, but merely used vague and conclusory language. This constituted violation of the Appellant's twin rights of equal protection under the Fourteenth Amendment and due process under the Fifth Amendment of the United States Constitution. It was a flagrant discrimination against Appellant. Moreover, as it was not already enough punishment for Appellant, the Appelle cut Appellant's visitation down to only two days a month (1 day per two weeks). Even unfit fathers (drunkards, ex-convicts and prostitutes, etc.) are granted more liberal rights of visitation. Appellant's son, after such abrupt interruption in visitations, became withdrawn, capricious and irritable, his physical and mental development has been inhibited. In addition to that

punishment Appellee Griffith awarded only one week per year vacation for the Appellant and his son. No national or religious holidays either, and specifically prohibited Appellant from seeking medical attention or treatment for his son. In addition of these restrictions, the Appellant, becoming a non-custodial parent, automatically lost his parental rights for participating in guidance, physical, intellectual and religious development of his son.

This award deprived Appellant of his constitutionally guaranteed rights to raise children, to love and care for his son, and caused irreparable harm to both Appellant and his son by their summary separation and by imposing condition of a "broken home" on Appellant's son.

On the issues of alimony, child support, and legal fees, the evidence established that Appellant had barely enough money to pay his own living expenses, and yet he was regularly paying $200.00 a month to support his child. Appellant's wife, being a first-rate legal secretary, testified at that hearing that her income each month was only $52.00, and yet her monthly expenses were $2,271.00 and no debts. In her financial statement she showed that she was paying mortgage to the trust she had set up by herself a few months ago in the Appellant's son's name. The Appellant's counsel called Appellee Griffith's attention that Appellant's wife was trying to defraud the Court. That transaction was nothing more than placing part of her own money (about $200,000) from one pocket into her other pocket, then using this money for her own purposes (bought, with cash, a $63,500 condominium apartment) and testifying that she had to pay this money back to her own trust, with some interest of course, while declaring to be impoverished and demanding alimony and more child support from Appellant.

Notwithstanding the direct, fully corroborated evidence as to the source and application of Appellant's income and the constrast between that evidence and the fraudulent evidence submitted by the Appellant's wife, Appelle Griffith, solely on the basis of illegal, sexist considerations, without even asking Appellant's opinion of the amount of money he is able to pay, awarded to her the sum of $500.00 counsel fees, $32.25 for filing and service fees, $456.20 for the Appellant's wife transcript reporter and $400.00 a month as child support, which was well above the amount of money needed to support a child of three (3) years of age according to the United States Government and local department of welfare statistical data. (App. 6) With such award against him Appellant is left with less than $100.00 a month for food, medicines, debts, etc. Obviously, Appellant is forced to defy that oppressive court order to survive, which subsequently creates real threat to Appellant of imprisonment because of contemp. This constitutes involuntary servitude under the Thirteenth Amendment of the United States Constitution, and violates Appellants' right to due process and equal protection under the Fifth and Fourteenth Amendments as well.

The court order, regarding custody, fees, and child support, was in absolute disregard of Appellant's evidence and was in perpetuation of a long state-wide history in the Commonwealth of Virginia of judicial application and interpretation, making such awards only against males. By its conduct, the Commonwealth, acting by, and through, Appelles Robb, Balaes and Griffith, has consistently applied and interpreted its statutory and case law and its pernicious form of blatant discrimination.

On March 17, 1981, Appellant filed his complaint in the United States District Court for the Eastern District of Virginia Alexandria Division, asking to issue its declaratory judgement and preliminary and permanent injunctions against the Appellees, Robb, Balaes and Griffith, enjoining enforcement or execution

of the order of the Circuit Court of Fairfax County and that he be awarded damages. The District Court abstained from hearing the Appellant's complaint. (App.2) The Court of Appeals affirmed that decision (App. 1) on December 30, 1981 and denied Appellant's petition for rehearing (App. 3) on February 2, 1982. (App. 4)

REASON FOR GRANTING THE WRIT

In Santosky v Kramer, 50 LW 4333 this Court emphasized:

> The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.....
>
> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.... parents retain a vital interest in preventing the irretrievable destruction of their family life..... Id. at 4335

And further in the foot note 7:

> We therefore reject respondent's claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest.

Appellee Griffith did not have any evidence that positive, nurturing father-child relationships no longer exist when deprived Appellant of his son.

This Court granted certiorari to consider petitioners' constitutional claim in Santosky v Kramer, 450 U.S. 993 (1981)

The essential question in the Appellant's petition to the District Court and then to the Court of Appeals was that child custody and support statutes in Virginia are unconstitutional on their face and as applied.

The Court of Appeals was wrong in its reasoning for abstention and in applying the federal abstention doctrine in this case. In its opinion the Court of Appeals held (App. 1):

> Because custody proceedings are considered ongoing proceedings in Virginia, they afford a disappointed litigant such as Etlin, an adequate opportunity to present his constitutional claims.

No trial court of Virginia has authority to judge on a constitutional validity of Virginia statutes, and it is futile to ask the Virginia Supreme Court for a declaratory judgement because it was the Virginia Supreme Court that has interpreted the Virginia sex nurtual statute, Va. Code Ann. Section 31-15, and made it flagrantly unconstitutional. (See Rowlee v Rowlee, 211 Va. 689; 179 S.E. 2d 461 (1971); Harper v Harper, 217 Va. 477; 229 S.E. 2d 875 (1976); McCreery v McCreery, 218 Va. 352, and Appendices 7,8) Moreover, under Virginia statutues, Virginia Code Ann. Section 16.1-242, 20-108, child custody and support orders may be subject to modification at any time, but under Virginia Case Law the court may revise and alter its decree only if a material change in condition and circumstances has occured. Hammers v Hammers; 216 Va. 30; 216 S.E. 2d 20 (1975);Fetherstone v Brooks, 220 Va. 443; 258 S. E. 2d 513 (1979). No change of circumstances - no hearing. (App. 9,10) Material changes do not happen so often in people's life.

The Court of Appeals has failed to examine the Appellant's complaint in view of the standards for abstention set forth in Younger v Harris, 401 United States 37; Huffman v Pursue, Ltd., 420 United States 592, and other decisions of this Court.

Misuse an/or abuse of Younger principles in Federal Courts is becoming common because in many instances abstention doctrine is used automatically without analyzing each case in light of principles laid down in Younger. In Huffman v Pursue, Ltd., 420 U.S. 592, the Supreme Court held that the District Court should have applied the test laid down in Younger in determining whether to proceed on the merits. In the case on hand abstantion under Younger was inapproriate because Younger doctrine is applied in criminal prosecutions, especially when State criminal prosecution is pending. Then in Huffman it was extended to civil cases which are akin to criminal prosecution. The Supreme Court emphasized, in its

opinion by Mr. Justice Rehnquist, that:

> Strictly speaking, this element of Younger is not available to mandate federal restraint in Civil cases. Id., at 604.

And further explaining why Younger doctrine was extended to a civil case, Mr. Justice Rehniquist wrote:

> ... we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. Huffman, Supra, at 604.

The case on hand has no similarity with criminal prosecution. Moreover, analyzing it in light of Younger standards, one can see that early intervention was justified under the exceptions recognized in Younger such as: (1) the absence of a pending state proceeding; (2) the challenge statutes are flagrantly and patently unconstitutional; (3) the state court proceedings were conducted in bad faith with an intent to harass; (4) immediate and great irreparable injury can be shown; (5) remedies in the state courts are futile; (6) Appellant set forth substantial issues which have detrimental impact on our society and are worth of review by the Federal Court.

1

There was no such action in the Circuit Court of Fairfax County when Appellant had filed his federal complaint which was three weeks after the state order (App. 5) for the permanent care, custody and control of the minor child was entered. In Steffel v Thompson, 415 U.S. 452 (1974), the court considered whether Younger required exceptional circumstances to justify federal declaratory relief against state criminal statutes when a prosecution was not pending. In concluding that it did not, the court identified more specifically some of the means by which federal interference with state proceedings might violate the principles of comity and federalism on which Younger is based. The court noted that:

> the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.' Id., at 462,

and explained:

> When no state criminal proceeding is pending at the time the federal compalint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. Ibid.

As it has been already mentioned, regarding the continuing pending jurisdiction in the Virginia courts, these statutes have benn judicially narrowed by requiring the change of circumstances in order to modify any court decision. That is why the Order (App. 5) is final until there is change of circumstances. (App. 9, 10) On May 29, 1981, Appellant asked the state court for an order to compel his wife to produce documents in order to modify his exhorbitant child support payment without having any change of circumstances. The state court denied that request. (App. 10, Lines 1, 2, 11---23).

That is why on February 12, 1982 Appellant used a loophole and requested an emergency hearing in order to get some meaningful visitation with his son, pending a hearing in June to set custody order aside on the grounds of fraud. Appellant showed at the hearing that only one day of visitation every other weekend is an unreasonable restriction of the appellant's contacts with his son and it is damaging to the son's physical and mental development, that the parties son has the same needs to share of his father's love, care, and guidance as of his mother's. (App. 23, p. 886) Appellant asked, on a temporary basis, to allow him to see his son every weekend from Friday to Sunday, two evenings every week and two week vacation in winter and on Easter. No evidence was presented to refute the appellant's testimony and yet he was allowed only two extra days monthly.

2

Virginia child custody and support status, Va. Code Ann. Section 20-107, 20-108, 31-15 are unconstitutional on its face because of their vagueness, and flagrantly and patently unconstitutional as applied, because of discrimination against a whole

class of its citzens -- parents of the male sex.

VAGUENESS

Virginia child custody and support statute Va. Code Ann. Section 20-107 (App.11) does not set standards to define what is in the best interest of a child and how to measure those standards, what is unfit parent and how to measure that unfitness to justify termination his/her parental right for a custody of its child, what custody arrangement should be when both parents are fit and both still have equal parental rights.

Although the amount of child support is supposed to be sufficient to cover a child's, or children's needs, this statute (App.11) does not even mention these needs or standards to measure it, but needs and ability of parents to pay child support, the size of which no one knows.

The Supreme Court has held that:

> the exaction of obedience to a rule or standard which is so vague and indefinite as really to be no rule or standard at all... A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, at 239.

In the case on hand Appellee Griffith failed to give his opinion as far as finding facts, weighing them, and why his order, depriving Appellant of his son, was in the best interest of the child, but merely used vagued and conclusory language. (App.5) This Court often pointed out that such arbitrary application of a law is in violation of Due Process:

> We have little doubt that the Due Process Clause would be offended " if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." Quilloin v Walcott, 434 U.S. 246, 255 (1978) quoting Smith v Organization of Foster Families, 431 U. S. 816, 862-863 (1977) (Justice Stewart, J concurring in the judgement)

In Santosky v. Kramer, 50 L W 4333 it held:

> Any parens patriae interests in terminating the natural parent's rights arises only at the dispositional phase, after the parents have been found unfit. Id. at 4338 n.17

Explaining the danger of a vague statute, expecially in family relationships, the Federal Court, in Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10(1975) held:

> Due Process requires that state to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship. Id., at 21.

And further the Court continued:

> Under Iowa's current scheme, State officials may subjectively determine, on an ad hoc basis, what parental conduct is "necessary" and what parental conduct is "detrimental". The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child-rearing. The Court finds these standards unconstitutionally vague in that they are permeated with the "dangers of arbitrary and discriminatory application." Id., at 18, 19.

Appellee Griffith awarded a $400.00 a month per child of three (3) years against Appellant (App. 5-p.2) but in Schaefer v. Schaefer, in chancery NO. 66726 he awarded $10.00 against his mother for a child of same age, without explanation why the Appellant son's needs are 40 times higher than of Schaefer's.

On different occassions this Court emphasized the importance of standards of proof:

> The standard of proof is a crucial component of legal process, the primary function of which is "to minimize the rise of erroneous decisions" Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1 at 13 (1979).

And in Lassiter v. Department of Social Services, 452 U.S. 18:

> A parent's interest in accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. Id., at 27

In Addington v. Texas, 441 U.S. 418 (1979) this Court, declared that the function of a standard of proof, as the concept, is embodied in Due Process Clause.

SEX DISCRIMINATION AND DEPRIVATION OF A PARENT OF HIS CHILD ARE UNCONSTITUTIONAL

The Constitution for the United States guarantees equal justic law, and prohibits "legal" discrimination based on a citzen's sexua anatomy.

The United States Supreme Court and some Federal Courts held in many recent cases that statutes based solely on sex discrimination are prohibted by and are violative of the equal protection clause of the Fourteenth Amendment. Craig v. Boren (1976), 429 U.S. 190; Frontiero v. Richardson (1973), 411 U. S. 677. Included specifically within such prohibition is discrimination based upon a citizen's sexual anatomy in such relevant area as the equal rights of parenthood. Smith v. O. F. F. E. R., 431 U. S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); Duchesne v. Sugarman, 566 F. 2d 817 (2d Cir. 1977); Alsager v. District Court of Polk County, 406 F. Supp 10 (S.D. Iowa 1975), aff'd in part, 545 F. 2d 1137 (8th Cir. 1976); Reed v. Reed, 404 U.S. 71

The Supreme Court has made it clear that when state law regulating divorce comes into conflict with the Fourteenth Amendment, then it is the duty of the federal courts to resolve the conflict in favor of the constitution. Boddie v. Connecticut, 401 U. S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wisc. 1971); Geisinger v. Voss, 352 F. Supp. 104 (1972).

Federal courts have become increasingly protective of the constitutional rights of family unity. In Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, (1923), this Court determined that the "liberty" guaranteed by the Fourteenth Amendment [w]ithout doubt, ... denotes ... the right of the individual ... to marry, establish a home, and bring up children." Id., at 399, 43 S. Ct. at 626. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), this Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their contol." Id. at 534, 35,

45 S. Ct. at 573. In Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), this Court noted that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.... And it is the recognition of this that these decisions (Meyer and Pierce)have respected the private realm of family life which the state cannot enter." Id. at 166, 64 S. Ct. at 442.

Virginia judges' vocabulary is a clear indication of their defiance to that private realm of family life. Appellee Griffith permitted to the Appellant only "visitation" priviledges.(App.5 p.2) Another judge of the same Court in his order of February 16, 1982 (App. 26 p. 3) mentioned again parental "visitations" rights only. Both orders disregard Appellant's fundumental parental rights like love, care, guidance of his child upbringing and education, but recognize only his limited visitation rights. Presumption of "tender years" has dominated Virginia courts for decades, discriminating against fathers. The mother is generally recognized as the natural custodian of minor children of tender years. Rowlee v. Rowlee, 211 Va. 689, 179 S.E. 2d 461 (1971) (App. 7)

Although the Supreme Court of Virginia has pointed out in Harper v. Harper 217 Va. 477, 229 S.E. 2d 875 (1976) that there shall be no "presumption of law" in favor of either parent, the Court has several times stated that the "tender years presumption" is in fact no more than a permissible inference, which leaves in this law a lot of room on its face for discrimination against fathers. See, also, McCreery v. McCreery, 218 Va. 352.

A Virginia statute §31-15 language has been recently made sex neutral. But there have not been any changes in flagrant and patent violation of this law as applied. Charles E. Friend, in his book, The Law of Evidence in Virginia, (App. 8), states:

> Despite the use of the term "inference" in these decisions, and contrary to the express language of the statute, it is apparent both from the appellate opinions and from the manner in which the trial courts are applying the rules discussed, that, in effect, there is a strong presumption favoring the mother in such cases.

And further:

> ... but counsel should be aware that in pratice a presumption is operating here which is, at the very least, a true presumption; which appears to shift the burden of persuasion to the father; and which is, in some trial courts at least, virtually irrebuttable.

Two recent cases (App. 12, 13) contribute to the evidence of patent discrimination against males in the Fairfax County courts. In May v. May, it was admitted that both parents were fit, and yet no equal responsiblitiy was suggested to the parents, no equal time to spend with the child was suggested either. Custody of the parties son was awarded to the mother with limited visitations to the father. In Holsband v. Holsband, evidence showed that mother committed adultery and lied to the court, and again custody of the parties son was awarded to the mother with "reasonable" visitations to the father, and an exhorbitant amount of child support which exceeded the father's take-home pay.

There is not one case in Virginia in which both parents contested custody, both parents were fit, and "other things were equal," which resulted in an award by the court of custody to the father.

P. Robinson, President of Fathers United for Equal Rights in Virginia shows (App. 14) that during his long period of association with the organization he has learned about many custody cases, and that Virginia Courts, in divorce proceedings, grant mothers custody of children out of habit, and to the repeated detriment of the children.

Virginia custody statutes, especially as authoritatively construed and actually applied by the courts of the State of Virginia,

erects, within child custody contests in divorce actions, a rank discrimination, among litigants otherwise similarly situated, which is based solely upon the inherently suspect, sociologically irrelevant, and constitutionally impermissble criterion of the fortuitous circumstances of the litigants' respective sexual anatomies, and that the said flagrant and patent statutory preference and judicial discrimination in favor of female child custody contestants and against similarly situated male child custody contestants, is unlawful and void, and repugnant to the Constitution of the United States under the Fifth and Fourteenth Amendments.

3

The state court proceedings were conducted in bad faith with intent to harass. State court failed to stay proceedings as Appellant requested (App.15) There was very little chance for a male parent to get justice in Virginia courts, there is no chance at all for the Appellant now because a judge and state officials are parties in this suit.

At the beginning of every hearing in the State Court, Appellant's wife's counsel complained to a judge that Appellant is seeking vindication of federal rights in the Federal Court and that a State judge is a codefendant. As a result, each of those hearings was conducted in bad faith and with an intent to harass and intimidate, despite the fact that Appellant had all grounds to get judgement in his favor.

At the April 23, 1981 hearing for the Rule to Show Cause why Appellant is not complying with the court order (App. 5) of February 26, 1981, Appellant's wife's lawyer reminded the judge (App. 16) about the Appellant's federal complaint. Appellant showed unequivocally that he was complying with the court order in every respect but the amount of child support and costs, that he was diligently paying the amount of child support according

to his ability, that his wife and her lawyer lied to the court about the facts in their affidavit for the Rule. Neither the judge nor Appellant's wife could indicate any figure in Appellant's list of expenses which could be reduced in order for the Appellant to pay the full amount of child support. It was evident that the failure by the Court to examine adequately Appellant's financial ability made him unable to obey the Order, and was in violation of the Virginia child support and maintenance statute (Va. Code Annot. §20-107 (App.11)) that the amount of payment depends on parent's ability to pay.

> ... the inability of an alleged contemnor, without fault on his part, to render obedience to an order of the court, is a valid defenseto a charge of contempt. Laing V. Com., 205 Va. 511, 137 S.E. 2d 836 (1964).

But this matter of law was not convincing enough to a new judge of the same Fairfax County Circuit court (Bruce Bach), despite the fact that Appellant started paying $200.00 child support a year before the Order was entered, threatened to put Appellant in jail next time, and "advised" (App. 17, p. 29, 30):

- that Appellant sell his house (where his son was born and knows every corner);
- that Appellant get a second job and pay his wife the rest of the so called child support.

This was in clear violation to Appellant's dual constitutional rights guaranteeing liberties "to marry, establish a home, and bring up children", Meyer v. Nebraska, 262 U.S. at 399, and to be free from peonage. Entering an order, (App. 5) which compels Appellant to work for his wife and also to pay his wife's share of child support, in addition to his own share, and forcing Appellant to sell his property and hold two jobs in order to make those payments is nothing else but peonage.

> A "peon" is compelled to work for his or her creditor until his or her debts are paid. In re Lewis, 114 F. 963, 967 (N. D. Fla. 1902)

A Civil Rights law passed in 1867 (42 U.S.C. Section 1994) in part provides:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States.

The April 23 hearing is a clear illustration where the State proceeding is conducted with intent to harass or in bad faith and early intervention was justified even under the exceptions recognized in Younger v. Harris, 401 U.S. 37.

In Younger the Court also considered whether the policy of non-interference had been modified by the Court decision in DOMBROWSKI v. PFISTER, 380 U.S. 479 (1965), and the Court observed that:

> ... the arrests and threatened prosecutions in Dombrowski were alleged to have been in bad faith and employed as a means of harassing the federal court plaintiffs.

Referring to the Dombrowski case, Mr Justice Rehnquist, in the opinion of the Court, explained:

> That case was thus within the traditional narrow exceptions to the doctrine that Federal Courts should not interfere with State prosecutions. Huffman et al v. Pursue Ltd., 420 U.S. 602.

At that April 23 hearing, Appellant also asked to let him present his evidence in support of a modification of his child support payment, for the Appellant is unable to pay and the Court has failed to examine neither his son's needs nor the Appellant's ability to pay, which constituted a violation of due process. Appellant's request was denied. A week later, Appellant filed a motion for another hearing to modify his child support and time for the hearings was set for June 2, 1981. But it was sufficient for the Appellant's wife's counsel to make only one telephone call (without any motion being filed) to continue that hearing indefinitely. These are clear illustrations where the State proceedings are conducted in bad faith with an intent to harass.

At the hearing of May 14, 1981 for the Decree of Reference, Appellant's wife's lawyer again insinuated about Appellant's intention to bankrupt his wife, etc. and as a result the Commissioner harasses Appellant (App. 18 p. 21, 16) expressing his antipathy towards Appellant and forcing him at the beginning of the hearing to pay the Court Reporter and Commissioner's fees witout having heard the evidence and knowing who will be at fault. In addition to harassment, it was a violation of the equal protection clause of the Fourteenth Amendment.

At the May 29, 1981 hearing, Appellant asked for an order to compel his wife to produce documents in order to modify his child support payments, and eliminate the existing every-day threat to be convicted in contempt. Again, Appellant's wife's lawyer complained to the judge about Appellant's federal suit (App.19), and, as a result, despite the fact that Appellant showed that his wife and her lawyer had never, in the past, produced all documents requested, and that both of them had profusely lied at each hearing, there are no facts established (App.20), and that's why it is not possible to show any change of circumstances unless he gets all documents requested. The judge refused to enter that Order. (App. 20)

On March 22, 1982, Appellant's salary started to be garnished without even proper service on him or having an order for execution of the judgement of the April 23, 1981 hearing.

In Younger it was stated that to justify federal injunctive relief against state the movant must show "great and immediate irreparable injury," 401, U.S. at 46, only if the prosecution was conducted in good faith and without an intent to harass. Id., at 54.

Although in the case on hand, the State Court bad faith and intent to harass does not require to show injury, great and irreparable injury exists.

Immediate and great irreparable injury is inflicted because of existing statutes, as applied, deprive the Appellant's son of his father's love and care. Appellant's son, after the abrupt interruption in contacts with the father, as a result of the Appellee's order (App. 5), became withdrawn, capricious and irritable, his physical and mental development has been inhibited.

> For a child, the consequences of termination of his natural parent's rights may well be far-reaching....
> Some losses cannot be measured....
> Santosky v. Kramer, 50 LW at 4337, n.11

In the case similar to the case on hand, Davis v. Page, 442 F. Supp. 258 (1977), a child, Carl Thor Davis, was adjudicated dependent and was removed from his parents. The child's mother obtained weekend home visits with her son, and, in a year, finally secured the return of her son. The Federal Court stated that:

> the order adjudicating Carl Thor Davis dependent carried far-reaching legal consequences, Id., at 261

referring to the testimony of Sally A. Provence, M.D., Albert J. Solnit, M.D., and Andre P. Derdeyn, M.D. about the resulting long-term damage to the parent-child relationship described in their affidavits.

At the custody hearing of January 25, 1981 in the State Court, the Appellant's expert witness, Helen J. Ossofsky, M.D., showed the reasons why it was in the best interest of the Appellant's son to be in his (Appellant's) custody, or at least, to maintain very close contacts. Appellee L. Griffith, ignoring that evidence and depriving Appellant of his son, had intruded impermissibly on the private realm of Appellant's and his son's life.

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on

"the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645.

The 1978 National Institute of Mental Health Research Conference on Divorce has reached a conclusion where both sexes nurturing capacity is recognized and the Conference endorsed continous and meaningful contact with the non-custodial parent is critical to the child's subsequent adjustment.

The Los Angeles Consiliation Court's pamphlet (App. 22, p. 1,2,6) Cooperative Parenting Following Dissolution: Your Child Needs Both of You, notes:

> way to minimize the stress and avoid the long-term problems of children of divorcing families is for the youngsters to maintain continued and conflict-free contact with both parents. This will reassure the child of the continuing love of both parents and make it clear that he or she has not been abandoned by either parent.

This pamphlet was prepared by a committee of judges, mental health professionals, attorneys and parents with years of experience in working with parents going through the divorce.

Another aspect of injury to a child, if he is deprived of one parent as a result of divorce, was emphasized in the latest book, Divorce, Child Custody and the Family, (App.23, p.884) which was done in cooperation with numerous individual professionals, groups and offices, experts in child development.

Quoting from the Group for the Advancement of Psychiatry's Report on parenthood:

> Despite the fact that one parent can rear children and meet their physical needs, children need two parents for complete psychological growth and development. What this means is that, in order for the child to conceptualize himself as a developing person, he must identify himself with two parents - a man and a woman, a father and a mother.

Both parents are important for the child's development, but many studies show that the father's influence is especially important for a child's development.

Dr. Henry B. Biller, of the Unversity of R.I., in his book "Father, Child, and Sex Role," which is regarded as one of the classics in the neglected field of paternal determinants of personality development, states:

> "The father is a model for his child. His postive involvement facilitates the boy's cognitive functioning, his ability to control his impulses and to function independently and responsibly, and his overall interpersonal competence."

Dr. Streshinsky, in his work "How Divorce Really Affects Children" found that:

> "The only children satisfied with the visitation situation were those who were able to see their father several times a week. Others felt deprived..."

Statistics compiled by the United States Department of Justice show that most juvenile delinquents are from "broken homes." A number of social scientists' conclusion, which society does not like to accept, also was that one of the main reasons for juvenile delinquency is an absent father:

> "An absent father will more often result in an antisocial behavior in that family's children, as a result of the psychological process, even if the absence causes little economic hardship," Dr. L. Mosher: "Father Absence and Antisocial Behavior in Negro and White Males, Acta Paedo-psychiatriea, 1969, Volume 36, Fascicule 6/7, p. 186-202. McCord, J., McCord, W., and Thuber E., "Some Effects of Paternal Absence on Male Children," J. Abnorm. Soc. Psychol., 64, 361-369 (1962). Barton, R.V. and Whiting, J.W.M. Absent Father and Cross-Sex Identity. Merrill-Palmer Quart. 7, 85-95 (1961).

The irreparable harm has been done to the Appellant's son by being summary removed from his father after January 1981 custody hearing. Drs. Provence Robitscher and Solnit, in their expert testimony in Roe v. Conn, 417 F. Supp. 769 (1976) summarized their views as follows:

> Summary removal of a young child from a parent... disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love. Summary removal should be allowed only under conditions in which physical survival is at stake. (App.21)

Emphasizing the grave consequences of the parent's absence, well known researchers J. Goldstein, A. Freud, and A. Solnit indicate in their book "Beyond the Best Interest of a Child," as follows:

> "Where a parental care is inadequate, this may be matched by deficits in the child's mental growth. Where there are hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident, the child regresses along the whole line of his affections, skills, achievements and social adaptation... Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of parents ... The significance of parental absences depends, then, upon their duration, frequency, and the developmental period during which they occur. The younger child, the shorter is the interval before a leave-taking will be experienced as a permanent loss accompanied by feelings of helplessness and profound deprivation. Since a child's sense of time is directly related to his capacity to cope with breaches in continuity, it becomes a factor in determining if, when, and what urgency the law should act."

Commenting on New York court's assumption that termination of the natural parent's rights invariably will benefit the child, this Court held:

> This is a hazardious assumption at best. Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. Santosky v. Kramer 50 LW at 4338

This Court declared that a natural parent's:

> desire for and right to" the companionship, care, custody, and management of his or her children" is an interest far more precious than any property right. Lassiter v. Department of Social Services, 452 U.S. 18 at 27

Irreperable injury has been done to the Appellant as well.

Congress requires:

> "Evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty..." H.R. Rep. No. 95-1386, p. 22 (1978)

In addition to the damages to the physical and mental development of a child's intellectual development has suffered as well.

The Supreme Court, in Brown v. Board of Education, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954) pointed out:

> Today, education is perhaps the most important function of state and local governments. .... It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonbly be expected to suceed in life if he is denied the opportunity of an education.

A child's education starts in his family, by his parents. Depriving Appellant's son of his father is depriving him of that parent's cultural values; it is denying him the opportunity of an education.

5

Remedies in the State Courts are futile. According to the 1980 Report of the Judicial Counsel of Virginia to the General Assembly and Supreme Court of Virginia (p. 20) in 1979 Circuit Courts in Virginia disposed of 122,100 cases. Of this amount, appellate review was accomplished in only 239 cases, or something less than 0.3 percent. There is no intermediate appellate court in the Virginia judicial system, the sheer numbers make out a prima facie case of denial of due process because Circuit Judges, such as Appellee Griffith, are given virtually unreviewable discretion, license to do as they please, without concern or anxiety over review, because the simple facts of life are that in Virginia a judge's chance of any kind of review are only 0.3 in 100. Stated another way, a judge's chance of not being reviewed over 99 percent, and there is no automatic right for appeal in the Supreme Court of Virginia, which is a clear denial of due process.

Appellant opines that the odds are even greater when domestic relations cases decided against males are concerned.

In Younger the Court held that:

> .... it is a strong judicial policy against federal intervention with state criminal proceedings when a movant has an adequate remedy at law. 401 U.S. at 43.

Evidently, an adequate remedy does not exist in Virginia Courts. It is the Supreme Court of Virginia that made the statutes, challenged by Appellant, flagrantly unconstitutional by defying their sex neutral language and openly applying presumption of "tender years" which discriminates against a whole class of Virginia citizens -- parents of the male sex. To ask the Supreme Court of Virginia to declare presumption of "tender years" unconstitutional would be like putting a fox into a chicken coop.

In Gibson v. Berryhill, 411 U.S. 564 (1973), the Supreme Court held that it had jurisdiction because there the enjoined State proceedings were before a biased administrative body which could not provide a necessary predicate for a Younger dismissal, that is:

> .... the opportunity to raise and have timely decided by a competent State tribunal the federal issues involved. Id., at 577.

As Mr. Justice Stevens put it:

> A principled application of the rationals of Younger v. Harris, 401 U.S. 37, forecloses abstention in cases in which the federal challenge is to the constitutionality of the state procedure itself. There should be no abstention unless the state procedure affords a plain, speedy, and efficient remedy for the federal wrong... In my judgment, when a state procedure is challenged, an adequate forum must be one that is sufficiently independent of the alleged unconstitutional procedure to judge it impartially and to provide prompt relief if the procedure is found wanting. Juidice v. Vail, 430 U.S. 327, 339.

State officials are parties in this suit. One must not strain hard to discover why state interest here in having federal rights adjudicated in a state rather than federal forum.

> The very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights... Mitchum v. Foster, 407 U.S. 242, 92 S. Ct. at 2162.

In a federal court, this suit, on hand, will be between purely private parties.

6

Appellant sets forth substantial constitutional issues worthy of REVIEW by the Federal Court.

Continous deprivation of a father of his child has detrimental social-economic effect on our society. (App. 23 p. 795, 797) A New York Court, relying on the Fourteenth Amendment, said, that neither the child's interests nor the state's interests were served well by the "tander years" doctrine, and it was therefore often detrimental as well as unconstitutional. State ex. Rel. Watts v. Watts, 35 N. Y. S. 2d. 285 (1976).

The State registers no gain towards its declared goals when it separates children from the custody of fit parents. Stanley v. Illinois, 405 U. S. at 652.

Unreasonable and irrational approach in determining child custody creates "broken home" conditions which generate the most of juvenile delinquents.

Fathers who are deprived of their children and yet ordered to pay an exorbitant amount of child support may be forced to leave the area in which their children live, and, as a result, most mothers apply for help from Federal funds (AFDC). (App. 24,25) Quite often, fathers leaving the area snatch their children and take them along.

A number of Federal programs, laws and regulations, which expend a lot of federal funds, have been created to cure the consequences, instead of the causes, of these problems. The nationwide federal/state child support enforcement program, established as a result of the additon of Title IV-D to the Social Security Act through the enactment of Public Law 93-643 in 1974, strengthens the legal provisions for enforcing the child support obligation of an absent parent.

States are required, under this new legislation, to operate a child support enforcement program through a separate state-wide organizational unit as a condition for the state's participation in federal funding available under the Aid to Families with Dependent Children (AFDC) program. The federal government is responsible for monitoring and evaluating these state programs.

States are requred by 45 Code of Federal Regulations 302.53 to include, in their plans for implementing their child support enforcement program, a formula for determining the amount of this obligation.

Virginia is a recipient of federal fundings under the Aid to Families with Dependent Children program, which totaled $843 Million in 1977. But Virginia courts do not have any formula for determing a child's needs, instead they use, quite arbitrary, a percentage of the parents income.

In September, 1980, the Virginia Welfare Department paid $13,824,258 to [illegible],847 adults with 117,418 children under the Aid to Families with

Dependent Children program.

With one hand Virginia courts create families with dependent children by applying unconstitutional statutes; with the other hand Virginia takes, from the Federal Government, money to help those families which they have created.

The public is becoming more and more concerned about social problems which are created by judges in divorce procedures. The Congress, in a very recent law (P. L. 96-611, Section 7(a), H. R. 1406, Dec. 28, 1980), finds that:

> (1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody, and visitation of children, under the law;
>
> (2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes by the courts of other jurisdictions, are often inconsistent and conflicting.

Recently, the Office of Child Support Enforcement started a Federal Demonstration Grants program. Funding is authorized under Section 1110 of the Social Security Act. One of these programs priority projects is the "Establishment of Uniform Support Obligations." Explaining the importance of that project, the instruction says:

> States are required by Title IV-D of the 1974 Social Security Act to establish and to enforce child support obligations of absent parents of recipients of Aid to Families with Dependent Children and non-AFDC recipients. The amounts of the obligations that are being established, however, vary widely, not only from jurisdiction to jurisdiction, but also within jurisdictions. Even when comparing cases with similar circumstances these variations persist.

Among other priority projects is a State Study of Absent Parent's Ability to Pay Child Support (OCSE 81-4):

> One of the important questions involving child support enforcement is whether the absent parent has the ability to pay.

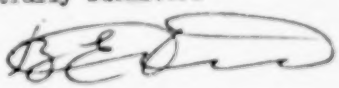
All these programs which involve a lot of Federal money and a lot of people, both on a state and Federal level, are results of irrational determination of child custody and support by courts, and unreasonably high amount of support, which put a father automatically in a position of contempt of the court Order, and he has to hide in order to avoid prosecution.

To reduce the number of "broken homes," to reduce juvenile delinquency, to reduce Federal spendings in subsidizing "broken homes," and fighting juvenile delinquency, to stop violations of Constitutional rights of a whole class of Virginia citizens, this Court has a compelling interest to enjoin Virginia's statutes in custody and child support and declare them unconstitutional.

CONCLUSION

For the foregoing reasons, Appellant, Vladimir N. Etlin, respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted



Vladimir N. Etlin,
Appellant, pro se

Appendix 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1760

Vladimir N. Etlin,

Appellant,

v.

John N. Dalton (Governor of Virginia), Marshall Coleman (Attorney General of Virginia), Lewis H. Griffith (Judge),

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: November 13, 1981 Decided: December 30, 1981

Before DUTZNER, HALL, and SPROUSE, Circuit Judges.

(Vladimir N. Etlin, Appellant Pro Se. Karen A. Gould, Assistant Attorney General; Timothy McAfee, Third-Year Law Student, for the Appellees.)

PER CURIAM:

Vladimir N. Etlin, a pro se litigant, appeals from the district court's order dismissing his action brought pursuant to 42 U.S.C. § 1983. In his complaint, Etlin requested, in addition to monetary damages, declaratory and injunctive relief to prohibit the enforcement of an adverse child custody determination and support order issued earlier this year by a Virginia circuit court. In dismissing the action without prejudice, the district court concluded that the doctrine of federal abstention applied and, therefore, precluded an immediate consideration of Etlin's § 1983 claims. We agree.

Under Virginia law, child custody determinations and support orders may be subject to modification at any time. See Va. Code Ann. § 16.1-242 (1981 Cum. Supp.); § 20-108 (1975 Repl. Vol.); § 31-17 (1979 Repl. Vol.). Because custody proceedings are considered ongoing proceedings in Virginia, they afford a disappointed litigant, such as Etlin, an adequate opportunity to present his constitutional claims. Younger v. Harris, 401 U.S. 37, 49 (1971). See Juidice v. Vail, 430 U.S. 327, 337 (1977). Therefore, it is clear that the doctrine of abstention applies in this instance. See Moore v. Sims, 442 U.S. 415 (1979).

Accordingly, the judgment of the district court is affirmed. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.

AFFIRMED.

Appendix 2

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VLADIMIR N. ETLIN,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO. 81-0257-A
	)	
JOHN N. DALTON, et al.,	)	
	)	
Defendants.	)	

ORDER

It appearing that there is an action in the Circuit Court of Fairfax County, Virginia, concerning the care, custody and maintenance of the plaintiff's minor children, decrees in which are subject to modification at any time, and that therefore the constitutional questions raised in this action may be raised in the pending state court action, it is hereby

ORDERED that this court abstain from hearing the matters raised by the complaint and this action is dismissed without prejudice.

/s/ J. K. B. J.
United States District Judge

Alexandria, Virginia
July 10th, 1981

Appendix 3

UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

January 11, 1982

Re: 81-1760, Vladimir N. Etlin v. John N. Dalton, etc.
(C/A 81-0257-A)

PETITION FOR REHEARING

APPELLANT, Vladimir N. Etlin, pro se, asks this Honorable Court for rehearing on the grounds that:

1.) A material law and a fact were overlooked in the Court decision.

A material law overlooked in the decision:

It is true that under Virginia law, § 20-108, child custody and support orders may be subject to modification at any time, but under Virginia Case law the court may revise and alter its decree if a material change in condition and circumstances has occurred. Hammers v. Hammers, 216 Va. 30 216 S.E.2d 20 (1975); Featherstone v. Brooks, 220 Va. 443; 258 S.E.2d 513 (1979). This is the way § 20-108 interpreted and used in Virginia courts. No change of circumstances- no hearing (See Appendix 3 of the informal brief).

In Steffel v. Thompson, 415 U.S. 452 (1974) the court noted that:

> the relevant principles of equity, comity, and federalism " have little force in the absence of a pending state proceeding". Id., at 462

No state proceeding was pending at the time Appellant had filed his federal complaint.

A material fact overlooked in the decision:

In his brief Appellant moved this court for its declaratory judgement that the Virginia statutes §§ 20-107, 20-108, 31-15, are unconstitutional on their face and as applied. No trial court of Virginia has authority to do that, and it is futile to ask the Virginia Supreme Court for a declaratory judgement because it was the Virginia Supreme Court that has interpreted the Virginia's sex mutral statutes § 31-15 and made that law flagrantly unconstitutional (See Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461(1971) Harper v. Harper 217 Va. 477, 229 S.E.2d 875(1976); McCreery v. McCreery, 218 Va. 352. and Appendices 5,6,7,8.)

Appendix 3.

So it does not matter whether custody proceedings are ongoing or not and whether Appellant can get another hearing in Virginia courts, as long as unconstitutional law is in effect Mr.Etlin will not have an equal protection in Virginia courts.

Respectfully submitted

Vladimir N. Etlin,
Appellant, pro se
7403 Lisle Ave. Falls Church,
Virginia, 22043

356-3106

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for rehearing was mailed this 11 day of January, 1982, to Karen A. Gould, Assistant Attorney General, Counsel for Appellees, at Supreme Court Building, 1101 E. Broad St. Richmond, VA. 23219

V.ETLIN

Appendix 4.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1760

Vladimir N. Ettin, Appellant,

versus

John N. Dalton (Governor of Virginia), Marshall Coleman (Attorney General of Virginia), Lewis H. Griffith (Judge), Appellees.

O R D E R

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Hall, and Judge Sprouse.

For the Court,

/s/ William K. Slate, II

CLERK

FILED

FEB - 2 1982

U. S. Court of Appeals
Fourth Circuit

Appendix 5

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHELLE M. ETLIN Complainant and Cross-Defendant v. VLADIMIR N. ETLIN Defendant and Cross-Complainant	In Chancery No. 68775

ORDER

THIS CAUSE came on to be heard, commencing on the fifteenth day of January, 1981, upon the motion of complainant, Michelle M. Etlin, for permanent custody of the minor child of the parties, Daniel Etlin, and upon the cross-motion of defendant, Vladimir N. Etlin, for permanent custody of the minor child of the parties, and, in the alternative, for visitation with said minor child; and upon the further motions of complainant for an award of child support, pendente lite spousal support and counsel fees; and upon consideration of the testimony of the parties, the testimony of the witnesses who appeared before the Court on the fifteenth day of January and the twentieth of January, 1981, upon the exhibits introduced and admitted into evidence by the respective parties and upon consideration of argument by counsel for the respective parties, it is hereby

ADJUDGED, ORDERED and DECREED that permanent care, custody and control of the minor child, Daniel Etlin, be and the same is hereby awarded to complainant, Michelle M. Etlin; and it is further

ADJUDGED, ORDERED and DECREED that the defendant, ·dimir N. Etlin, be and he is hereby awarded visitation privi- ·es with said minor child every other Saturday, beginning at ·00 o'clock p.m. until Sunday at 5:00 p.m. and, in addition, a ·itation privilege with said minor child for one week during · month of July in each year; and the defendant is to have h other reasonable visitation times with the minor child as · complainant shall deem to be appropriate; and it is further

ADJUDGED, ORDERED and DECREED that during such visita- ·n periods between the minor child and the defendant, in the ·nt the minor child needs medical attention on an emergency ·is, the defendant is responsible for seeking out that emer- ·cy care, but the defendant shall also immediately notify the ·plainant so that the complainant may be available, as quickly ·ossible, to assist in having assistance rendered to the child, ·d the defendant is otherwise prohibited from seeking medical ·ention or treatment for the minor child; and it is further

ADJUDGED, ORDERED and DECREED that the defendant be and · is hereby ordered and directed to pay the sum of $400.00 per ·th to the complainant for the support and maintenance of the ·or child, said monthly child support payments to be paid with- ·t demand and without deduction on the first day of the month, ·encing with the month of February, 1981; and it is further

ADJUDGED, ORDERED and DECREED that the defendant be and · is hereby ordered to maintain the child and the complainant on · present hospitalization and major medical insurance policy; · complainant shall be maintained by the defendant on such ·icy until such time as a final decree of divorce is entered ·ween the parties in this cause, and the child is to be main- ·ned by the defendant on said insurance until further Order of

the Court; and it is further

ADJUDGED, ORDERED and DECREED that the Court makes no award to the complainant of spousal support at this time; this decision is made without prejudice, however, for the complainant to raise this issue and have it heard on its merits when the divorce case is heard on its merits to determine if the complainant is entitled to spousal support at that time; and it is further

ADJUDGED, ORDERED and DECREED that the defendant be and he is hereby ordered to pay to the complainant the sum of $500.00 pendente lite counsel fees and the following costs: $32.25 for filing and service fees; and $456.20 for the transcript reporter, all of the foregoing amounts to be paid by defendant to complainant on or before March 6, 1981.

AND THIS CAUSE IS CONTINUED.

ENTERED this 26th day of February, 1981.

THE HONORABLE LEWIS H. GRIFFITH,
JUDGE, Circuit Court of Fairfax
County, Virginia

By:

SANFORD K. AIN
4085 Chain Bridge Road, Suite 203
Fairfax, Virginia 22030
331-7120
Counsel for Complainant

Seen and exception noted:

STEFAN C. LONG
121 South Royal Street
Alexandria, Virginia 22313
549-8821
Counsel for Defendant

Vladimir N. Etlin

A COPY TESTE:
JAMES E. HOOFNAGLE, CLERK
By Deborah L. Cannaday
Deputy Clerk

No. 81-6629

QUESTIONS PRESENTED FOR REVIEW

1. Whether severance of Appellant's natural familial bonds with his son, by denying him custody of his son and terminating meaningful contacts and control over his son, is a violation of Appellant's fundumental liberties.

2. Whether Virginia's custody and support laws are unconstitutional on their face and as applied.

3. Is the absence of Automatic right of appeal in Virginia a denial of Due Process.

4. Has the Court of Appeals departed from the accepted course of judicial proceedings by its abstention in this case when several exceptions under the Younger doctrine were available.

IN THE SUPREME COURT OF THE UNITED STATES

VLADIMIR N. ETLIN,
APPELLANT

v.

NO. 81 6629

CHARLES ROBB
GERALD BALAES
LEWIS GRIFFITH,
APPELLEES

RECEIVED
MAY 3 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Appellant, Vladimir Etlin, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Appellant did not ask leave to proceed either in the U.S. District Court or U.S. Court of Appeals. Appellant's affidavit in support of this motion is attached hereto.

Vladimir Etlin

AFFIDAVIT

I, Vladimir Etlin, being first duly sworn according to law, depose and say that I am the Appellant in the above-entiteled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. My salary is: gross $ 2,571 a month, net $ 1,636 a month.
   My employer is Arlington County, Virginia

2. I have not received within the past twelve months any income from any source.

3. I do not have any savings account. I have a checking account which has about $200 at this moment.
   I have a debt of $ 2,600 and a car loan of about $ 2,100 left to pay. $400 a month has beeing garnished of my salary at this time.

4. I do not have any valuable property, or stocks, bonds, notes.
   I have a house, I am living in, which has value of about $62,000
   I have a car, Datsun 210 of 1980, which has value of about $ 3,500.

5. My son, Daniel Etlin, is dependent upon my support.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Vladimir Etlin

Subscribed and Sworn to before
me this 3rd day of May 1982.

Notary Public

My commission expires April 12, 1984

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SUPREME COURT, U.S.

Appendix 6

81 6629

STATISTICAL REPORT

VOLUME XLII SEPTEMBER, 1980 NUMBER 1

PREPARED BY BUREAU OF RESEARCH AND REPORTING

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF WELFARE

VIRGINIA DEPARTMENT OF WELFARE RICHMOND, VIRGINIA

App. 6

LAIR BUILDING
07 DISCOVERY DRIVE
CHMOND, VIRGINIA 23288

WILLIAM L. LUKHARD
COMMISSIONER

COMMONWEALTH of VIRGINIA

DEPARTMENT OF WELFARE

Telephone (804) 281-9204

February 24, 1981

Mr. V. Etlin
7403 Lisle Avenue
Falls Church, Virginia

Dear Mr. Etlin:

In reply to your request for data available to determine the amount of money needed to support a child of 3 years of age, the United States Department of Agriculture has furnished us with the following information for the Southern Urban moderate priced income level family:

For the year 1979, annual cost for a child 3 years of age $3,142.00. This cost covered:

Food
Shelter
Clothing
Medical care
Transportation and Misc.

We are also enclosing a copy of our latest statistical bulletin which gives the amount of money that was paid for maintenance, room and board for Aid to Dependent Children - Foster Care Table V and Regular Foster Care Table VIII.

Sincerely,

Carl L. Sitter, Chief
Bureau of Research & Reporting

CLS/cal

Attachments

App. 6

TABLE I

PUBLIC ASSISTANCE

STATE SUMMARY DATA

Cases Receiving Assistance and Amount of Assistance

		SEPTEMBER 1980	SEPTEMBER 1979	PERCENTAGE CHANGE
AUXILIARY GRANT PROGRAM:				
AGED:	Cases	1,554	1,377	+ 13%
	Expenditures	$ 286,491	$ 241,939	+ 18%
DISABLED:	Cases	1,364	1,170	+ 17%
	Expenditures	$ 264,020	$ 218,718	+ 21%
AID TO DEPENDENT CHILDREN:				
REGULAR				
Cases		62,344	56,792	+ 10%
Adults		52,847	47,632	+ 11%
Children		117,418	110,184	+ 7%
Expenditures		$13,824,358	$11,592,673	+ 19%
FOSTER CARE				
Cases		1,502	1,531	- 2%
Children		2,359	2,585	- 8%
Expenditures		$ 396,831	$ 370,502	+ 7%
EMERGENCY ASSISTANCE - ADC FAMILIES:				
Cases		11	8	+ 38%
Adults		14	13	+ 8%
Children		22	27	- 19%
Expenditures		$ 2,879	$ 1,917	+ 50%
EMERGENCY ASSISTANCE - OTHER NEEDY FAMILIES:				
Cases		11	5	+ 20%
Adults		19	9	+ 11%
Children		27	15	+ 80%
Expenditures		$ 1,700	$ 1,414	+ 20%
GENERAL RELIEF - MAINTENANCE ONLY:				
Cases		6,521	6,026	+ 8%
Persons		8,329	7,727	+ 8%
Expenditures		$ 923,315	$ 788,939	+ 17%
FOSTER CARE:				
Cases		4,159	4,478	- 7%
Expenditures		$ 726,923	$ 678,560	+ 7%

App. 6

TABLE VIII - FOSTER CARE - (Cont'd)

County	FOSTER CARE Number That Received Assistance	Amount	Average Grant
Wise	9	$ 1,980.60	$220.07
Wythe	15	2,031.00	135.40
York	11	2,558.21	232.56
City			
Alexandria	107	18,565.40	173.51
Bristol	25	3,863.33	154.53
Buena Vista	9	1,502.09	166.90
Charlottesville	54	6,682.87	123.76
Chesapeake	99	15,579.47	157.37
Clifton Forge	4	572.00	143.00
Colonial Heights	13	2,929.41	225.34
Covington	11	1,200.94	109.18
Danville	28	3,627.43	129.55
Emporia	6	907.75	151.29
Falls Church	-	-	-
Franklin	2	374.00	187.00
Fredericksburg	22	3,833.10	174.23
Galax	3	897.00	299.00
Hampton	65	9,817.96	151.05
Harrisonburg	5	941.32	188.26
Hopewell	28	3,879.23	138.54
Lexington	7	1,130.00	161.43
Lynchburg	128	26,561.07	207.51
Manassas	1	350.00	350.00
Manassas Park	9	1,400.00	155.56
Martinsville	21	3,524.00	167.81
Newport News	134	19,172.19	143.08
Norfolk	323	49,706.43	153.89
Norton	4	338.90	84.73
Petersburg	89	13,900.88	156.19
Portsmouth	141	14,085.51	99.90
Radford	4	373.80	93.45
Richmond	396	96,566.68	243.86
Roanoke	213	37,901.44	177.94
Staunton	32	5,619.90	175.62
Suffolk	88	14,338.23	162.93
Virginia Beach	165	21,548.40	130.60
Waynesboro	18	3,362.49	186.81
Williamsburg	3	805.65	268.55
Winchester	38	7,219.27	189.98
STATE TOTALS	4,159	$726,923.13	$174.78

Appendix 7

awarding the custody of the children. Gramelspacher v. Gramelspacher, 204 Va. 839, 134 S.E.2d 285 (1964).

The custody of minor children is never to be given to one parent to punish the other. Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971).

The innocent parent on whose prayer a divorce is granted is usually entitled to the custody of the children. A woman compelled by her husband to resort to a divorce ought not to obtain it at the expense of losing the society of her children, and as one who has done well or ill in the marriage relation will be likely to do the same in the parental, all courts lean to the innocent parent when determining the custody of the child. Owens v. Owens, 96 Va. 191, 31 S.E. 72 (1898). See Bailey v. Bailey, 62 Va. (21 Gratt.) 43 (1871).

The father is the legal custodian of the minor children and they will not be taken from his custody without the strongest reasons therefor, and this right is not affected by the voluntary separation of the parties. Latham v. Latham, 71 Va. (30 Gratt.) 307 (1878).

But court will exercise discretion in determining who shall have custody. — In controversies over the custody of children of divorced parents, while our law fully recognizes the primary right of the father to the custody of the child, the court will exercise its discretion according to the facts and what appears to be best calculated to promote the infant's welfare, having due regard to the legal rights of the party claiming the custody. The welfare of the child is the controlling consideration. Meyer v. Meyer, 100 Va. 228, 40 S.E. 1038 (1902), following Stringfellow v. Somerville, 95 Va. 701, 29 S.E. 845 (1898); Parrish v. Parrish, 116 Va. 476, 82 S.E. 119 (1914).

The mother is the natural custodian of her children of tender years, and if she is a proper person, other things being equal, the law favors awarding her their custody, especially when the children are girls. Campbell v. Campbell, 203 Va. 61, 122 S.E.2d 658 (1961).

The mother is generally recognized as the natural custodian of minor children of tender years and is given custody if she is a fit and proper person and other considerations balance. Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971).

The rule favoring the mother as custodian is also applicable when the mother is not the innocent party and the divorce has been granted to the father. Campbell v. Campbell, 203 Va. 61, 122 S.E.2d 658 (1961).

The welfare of the child is to be regarded more highly than the technical legal rights of the parent. Where the interest of the child demands it, the rights of the father and mother may be disregarded. Forbes v. Haney, 204 Va. 712, 133 S.E.2d 533 (1963).

The controlling consideration in all controversies between parents over the custody of their minor children is the welfare of the children. Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971).

In determining what is in the best interest of a minor child whose custody is an issue between the parents, the court must look to and consider the qualifications and fitness of the parents, their adaptability to the task of caring for the child, their ability to control and direct it, the age, sex and health of the child, its temporal and moral well being, as well as the environment and circumstances of its proposed home and the influences likely to be exerted upon the child. Campbell v. Campbell, 203 Va. 61, 122 S.E.2d 658 (1961); Hall v. Hall, 210 Va. 668, 173 S.E.2d 865 (1970).

The wishes of the children, if they are of the age of discretion, should be considered and given weight, although their wishes are not conclusive. Hall v. Hall, 210 Va. 668, 173 S.E.2d 865 (1970).

Court retains jurisdiction throughout infancy of child. — Relief under this section remains within the court's jurisdiction throughout the infancy of the child involved. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747 (1958).

Power to alter or change custody. — It is rare when a court can be positive, at the time, that its award of custody will prove to be for the best interest of the child, which is the paramount question. The uncertainty involved is the reason for this section, which empowers the court to alter or change the custody of children, viewed in the light of subsequent events. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747 (1958).

Divided custody was held to be in the child's best interest under the facts. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747 (1958).

Decree for divided custody modified on appeal. — See Brooks v. Brooks, 201 Va. 731, 113 S.E.2d 872 (1960).

Illustrations. — The child was given to the mother, who was the innocent party and had instituted the suit for divorce. Bailey v. Bailey, 62 Va. (21 Gratt.) 43 (1871). See Myers v. Myers, 83 Va. 806, 6 S.E. 630 (1887).

Wife held entitled to custody of child. Hughes v. Hughes, 173 Va. 253, 4 S.E.2d 402 (1939).

On decreeing a divorce the wife is the proper custodian of an infant of seven months. Trimble v. Trimble, 87 Va. 217, 33 S.E. 531 (1899).

Where a wife left her husband without good legal grounds and took their child with her, upon a decree for a divorce a mensa et thoro at the suit of the husband, the child will be restored to the husband, though it is a female and but three years old. Carr v. Carr, 63 Va. (22 Gratt.) 168 (1872). See Latham v. Latham, 71 Va. (30 Gratt.)

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Appendix 8

THE LAW OF EVIDENCE IN VIRGINIA
CHARLES E. FRIEND

10. Former VA. CODE ANN. § 18.2-302.

11. Sandiford v. Commonwealth, 217 Va. 117, 225 S.E.2d 409 (1976).

12. 421 U.S. 684 (1975). *See* Stillwell v. Commonwealth, 219 Va. 214, 247 S.E.2d 360 (1978).

13. Davis v. Commonwealth, 219 Va. 395, 252 S.E.2d 299 (1979). The statute also creates a presumption of the accuracy of certified records. *Id.*

§ 128. Presumptions Concerning Infants.

Page 345. Add at end of text:

"Tender Years Presumption"

Several Virginia cases have enunciated the principle, sometimes referred to as the "tender years presumption", that the mother is the natural custodian of her child of tender years, and that, if she is a fit and proper mother, she should be given custody of the child.[8] As the Supreme Court of Virginia has pointed out,[9] the applicable statute specifically states that there shall be no "presumption of law" in favor of either parent.[10] In addition, the Court has several times stated that the "tender years presumption" is in *fact* no more than a permissible inference."

Despite the use of the term "inference" in these decisions, and contrary to the express language of the statute, it is apparent both from the appellate opinions and from the manner in which the trial courts are applying the rules discussed that, in effect, there is a strong presumption favoring the mother in such cases. Since no jury is involved in these cases, it is difficult to determine just how the presumption operates procedurally, but counsel should be aware that in practice a presumption is operating here which is, at the very least, a true presumption; which appears to shift the burden of persuasion to the father; and which is, in some trial courts at least, virtually irrebuttable.

Citations:

8. *See* Mullen v. Mullen, 188 Va. 259, 49 S.E.2d 349 (1948). *See also* Moore v. Moore, 212 Va. 153, 183 S.E.2d 172 (1971).

9. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

10. VA. CODE ANN. § 31-15. The term "presumption of law" includes both true (rebuttable) presumptions and conclusive (irrebuttable) presumptions. See § 90 *supra*.

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Appendix 9

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Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

In exercising power under this section, the court may revise and alter its decree if a material change in condition and circumstances has occurred. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

A contract between the husband and wife cannot prevent the court from exercising power under this section. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

The trial court cannot be precluded by agreement from exercising its statutory power under this section to alter child support under appropriate circumstances. Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975).

This section gives the divorce court continuing jurisdiction to change or modify its decree concerning the custody and maintenance of minor children, and a contract between husband and wife cannot prevent the court from exercising this power. Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 513 (1979).

A divorce court has continuing jurisdiction during a child's infancy to provide for his support and maintenance. Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979).

Revision permitted for material change in condition or circumstances. — In exercising power under this section the court may revise and alter its decree if a material change in condition and circumstances has occurred. Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 513 (1979).

Effect of child reaching majority. — The divorce court's jurisdiction over a child is eliminated ipso facto when the child reaches his majority. Moreover the same event terminates, by operation of law, the prospective effect of the judicial support decree. The statutory limitation on the divorce court's authority to order payment of child support cannot be nullified by the entry of a support order during minority. Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975).

Once the child reaches majority, the jurisdiction of the divorce court to provide for his support and maintenance terminates unless otherwise provided by agreement incorporated into the divorce decree. Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979).

Modification of contracts for support of children beyond majority. — The legal obligation of a parent to support his children only during their minority does not preclude the parent from contracting to support the children after their minority. However, where such contracts are incorporated into support decrees by a divorce court, they can only be nullified by that court to the extent of its jurisdiction. Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979).

Apportionment of unitary award made pursuant to approved settlement agreement. — A court, without any necessity therefor, may not apportion a unitary award made pursuant to an approved settlement agreement. Wickham v. Wickham, 215 Va. 691, 213 S.E.2d 750 (1975). Quoting Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975), in application to cases involving quite unlike marital factual situations as therein.

Burden of proof. — The burden is on the father of minor children to prove by a preponderance of the evidence that a change in his capacity to pay rendered him unable to keep up the payments of the amounts fixed by the agreement with his wife and ratified by the court. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

Spouse seeking change must show that his lack of ability to pay is not due to his own voluntary act or because of his neglect. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

The burden rests upon the party seeking to alter the decree to establish a material change in condition and circumstances by a preponderance of the evidence. Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 513 (1979).

Where a court order provided for temporary placement of the children with their maternal grandmother, the father, who in fact instituted a proceeding for custody, was not clothed with the parental presumption generally accorded natural parents in a dispute with nonparents, and the burden was upon him to prove that circumstances had so changed since the order that it would be in the children's best interests to transfer custody to him. McManus v. Redgrave, 217 Va. 414, 227 S.E.2d 741 (1976).

Where the unchallenged order of a juvenile court remains in effect, the burden is on a parent who seeks to change the custody to show that circumstances have so changed that the best interests of the child require the transfer. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

Where the mother appealed the award of custody made by the juvenile court and proceeded to seek custody of the son in the same trial court in the chancery cause in which she sought a divorce, under these circumstances, the only burden on the mother as the moving party was to show that she was a fit parent and that, since the father was also fit, other things were equal between them. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

Where the mother's parental custody rights were previously altered by court order for her to be entitled to a later change in custody, the burden was upon her to show the circumstances had so changed since entry of the previous order that it would be in the child's best interest to transfer custody to her; the burden was not upon the paternal aunt to show parental

[illegible] Watson, 215 Va. [illegible], 208 S.E.2d 897 (1974).

Burden to show changed cir[illegible] so as to justify transfer of [illegible] restained. — See Watson v. Shepard, 215 Va. 548, 210 S.E.2d 897 (1974).

Disclosure relating to child [illegible] required. — Where the father [illegible] to the amount of payments for [illegible] and maintenance of his minor child [illegible] of a change in his financial condition, [illegible] make a full and fair disclosure to the [illegible] to pay. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

Remarriage of spouse seeking [illegible]. — The fact that the spouse seeking support obligation has remarried [illegible] other funds is proper upon [illegible] entitled to [illegible] at law, [illegible] Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

§ 20-109. Changing ma[illegible] stipulations as to maintenance, remarriage or death. — Upon the decree, or cause to cease, [illegible] may thereafter accrue whether awarded as the circumstances [illegible] ulation or contract signed by [illegible] awarded is filed with the [illegible] directing the payment of [illegible] or counsel have established [illegible] monetary or nonmonetary [illegible] stipulation or contract pro[illegible] for support and maintenance, [illegible] whether entered into here[illegible] court shall, upon such re[illegible] for such former spouse shall [illegible] the death of any such former [illegible] shall be made to the estate [illegible] unless such stipulation or [illegible] of remarriage or death. (C[illegible] p. 397, 1948, p. 593, 1972, [illegible]

Cross reference.

As to power to support and [illegible] lien on real estate, see § 8.01 [illegible]

The 1977 amendment deleted [illegible] party may object thereto prior [illegible] the decree" following "stipulation" near the middle of the section.

The 1978 amendment inserted [illegible] adding or imposing on other [illegible] solemnization, monetary or nonmonetary [illegible] first person.

Law Review.

For survey of Virginia law [illegible] relations for the year 1974-1975, see [illegible] Rev. 1734 (1975). For survey of Virginia [illegible] domestic relations for the year 19[illegible]

Appendix 10

THE COURT: The only way you can get a change in support and maintenance is to show a change in conditions since January. You will only be entitled to documents and evidence that will show a change in conditions and circumstances since January and not prior to January.

MR. ETLIN: That's correct, Your Honor. And that's what I'm requesting from your client, to produce documents to show that she purged in court --

THE COURT: (Interposing) She what?

MR. ETLIN: She lied to the Court.

THE COURT: We're looking at a change in conditions.

MR. ETLIN: That's a change of conditions because she showed different assets she has.

THE COURT: I'm not letting you have anything prior to January. Any income tax returns, statements from employers, cost of living, receipts, leases, any of that you may have since January to show a change of conditions in the living standard that would be reduced which in turn would reduce your obligation in support and maintenance you are entitled to.

MR. ETLIN: But I cannot show changes -- we didn't have evidence what she had on that day in January

Transcript of the May 23, 1978 hearing

TABLE V - AID TO DEPENDENT CHILDREN - (Cont'd)

Counties	REGULAR AID TO DEPENDENT CHILDREN					AID TO DEPENDENT CHILDREN-FOSTER CARE		
	Cases	Total Persons	Total Amount	Average Grant Per Case	Average Grant Per Person	Cases	Children	Total Amount
Galax	75	191	$ 14,214.00	$189.52	$ 74.42	4	10	$ 1,387.53
Hampton	2,350	6,152	609,902.00	259.53	99.14	39	57	8,234.97
Harrisonburg	97	241	19,663.00	202.71	81.59	7	10	1,486.89
Hopewell	372	986	81,911.00	220.19	83.07	13	30	4,488.40
Lexington	55	142	11,824.00	214.98	83.27	3	7	1,099.00
Lynchburg	824	2,263	182,838.00	221.89	80.79	23	30	5,111.57
Manassas	159	428	42,203.00	265.43	98.61	-	-	-
Manassas Park	111	302	27,345.00	246.35	90.55	1	1	187.00
Martinsville	256	637	53,636.00	209.52	84.20	9	12	1,709.00
Newport News	3,040	8,365	671,512.00	220.89	80.28	78	143	21,916.85
Norfolk	7,712	21,469	1,725,926.55	223.80	80.39	71	174	26,772.45
Norton	39	124	8,070.00	206.92	65.08	3	6	626.40
Petersburg	1,366	3,935	307,407.00	225.04	78.12	30	63	9,440.66
Portsmouth	3,322	9,170	751,807.00	226.31	81.99	52	60	12,403.00
Radford	54	139	11,676.00	216.22	84.00	2	6	1,052.85
Richmond	6,976	20,187	1,623,874.80	232.78	80.44	323	420	74,690.85
Roanoke	2,415	6,572	528,571.50	218.87	80.43	85	129	23,494.03
Staunton	150	378	32,630.00	217.53	86.32	6	6	1,175.60
Suffolk	1,115	3,116	225,924.00	202.62	72.50	27	52	9,030.04
Virginia Beach	1,881	4,954	396,371.00	210.72	80.01	22	27	4,442.04
Waynesboro	172	442	41,326.00	240.27	93.50	1	1	118.00
Williamsburg	17	38	3,318.00	195.18	87.32	4	5	752.00
Winchester	212	581	46,407.00	218.90	79.87	2	2	347.23
STATE TOTALS	62,344	170,265	13,824,357.68	221.74	81.19	1,502	2,359	396,831.45

App. 6

Appendix 11

requirements for such suits. — No ...rce shall be maintainable, unless one ... has been an actual bona fide resident ...ceding the commencement of the suit; ...ge be maintainable, unless one of the ...en an actual bona fide resident of this ... For the purposes of this section only, ...ited States has been stationed in this ...se for a period of six months or more ...tion between such parties, and such ... in this State until and at the time a ...nmenced, then such person and his or ...ciled in and to have been a bona fide ...i of time.

...upon separation of the husband and ... and separate domicile, though the ...r such circumstances as would not ...nt. (Code 1919, § 5105; 1922, p. 589; ...978, c. 412.)

Law Review.

For survey of Virginia law on domestic ...elations for the year 1973-1974, see 60 Va. L. ...ev. 1529 (1974).

Effective date. — This repeal is effective ... 1, 1977.

...nd conducted; costs. — Such suit ...r suits in equity, except that the bill ...a divorce, annulment, or affirmation ...borated testimony of the parties or ...nt answer or not, the cause shall be ...of either party in the pleadings or ...h proceedings shall be served in this ...e the same; provided, however, that ...menced and an appearance has been ...sel, then notices to take depositions ...edings except contempt proceedings, ... copy to counsel for opposing party, ...ceptance of service or a certificate of ...he Supreme Court of Virginia. Costs ...and justice may require. (Code 1919, ... 202; 1968, c. 484; 1975, c. 644; 1977, ...

Law Review.

For survey of Virginia law on domestic ...lations for the year 1974-1975, see 61 Va. L. ...ev. 1732 (1975). For survey of Virginia law on ...idence for the year 1974-1975, see 61 Va. L. ...ev. 1752 (1975).

The allotment of counsel fees, etc.

This section recognizes that the amount of counsel fees is a matter for the exercise of the sound discretion of the trial court. Ingram v. Ingram, 217 Va. 27, 225 S.E.2d 362 (1976).

Sufficiency of corroboration.

Corroboration of husband's testimony of alleged cruel conduct of his wife, provided by her testimony or admissions, was not sufficient. Aschner v. Aschner, 215 Va. 624, 212 S.E.2d 278 (1975).

Applied in Rowand v. Rowand, 215 Va. 344, 210 S.E.2d 149 (1974); McIlwain v. McIlwain, 215 Va. 633, 212 S.E.2d 284 (1975); Cupps v. Cupps, 216 Va. 382, 219 S.E.2d 868 (1975).

§ 20-99.1. How defendant may accept service.

Law Review. — For survey of Virginia law on domestic relations for the year 1973-1974, see 60 Va. L. Rev. 1529 (1974).

§ 20-103. Court may make orders pending the suit, etc.

Law Review. — For survey of Virginia law on domestic relations for the year 1974-1975, see 61 Va. L. Rev. 1732 (1975).

Allowances are within discretion of the court.

This section recognizes that the amount of counsel fees is a matter for the exercise of the sound discretion of the trial court. Ingram v. Ingram, 217 Va. 27, 225 S.E.2d 362 (1976).

§ 20-104. Order of publication against nonresident defendant.

Law Review. — For a discussion of the question of whether Virginia denies indigents the right to divorce, see 12 U. Rich. L. Rev. 735 (1978).

Applied in Nelson v. Rogers, 389 F. Supp. 1148 (W.D. Va. 1975).

§ 20-105.1. Alternative procedures. — The provisions of Title 8.01 for orders of publication shall be construed as alternatives to the procedures set forth in the preceding three sections (§§ 20-104 to 20-105) and not in conflict therewith. (1978, c. 46.)

Law Review. — For a discussion of the question of whether Virginia denies indigents the right to divorce, see 12 U. Rich. L. Rev. 735 (1978).

§ 20-107. Court may decree as to maintenance and support of parties and custody of children. — Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the parties, or either of them, and the care, custody and maintenance of their minor children, and may determine with which of the parents the children or any of them shall remain, provided, that the court shall have no authority to decree support of children or support and maintenance of the spouse to continue after the death of the person ordered to pay such support and maintenance. The court may provide in its decree for visitation privileges for grandparents, stepparents or other family members. The court shall, in determining such support and maintenance for the spouse or children, consider the following:

(1) The earning capacity, obligations and needs, and financial resources of the parties;

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(2) The education and training of the parties and the ability and opportunity of the parties to secure such education and training;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, physical and mental condition of the parties;

(5a) The contributions, monetary and nonmonetary, of each party to the well-being of the family;

(5b) The property interests of the parties, both real and personal;

(6) Such other factors as are necessary to consider the equities between the parties.

In addition to or in lieu of periodic payments for maintenance and support of a spouse, the court may, in its discretion, award a lump sum payment, based upon consideration of the property interests of the parties except those acquired by gift or inheritance during the marriage.

Provided, however, that no permanent support and maintenance or lump sum payment for the spouse shall be awarded by the court from a spouse if there exists in his or her favor a ground of divorce under any provision of §§ 20-91 (1) through (8) or 20-95. (Code 1919, § 5111; 1926, p. 105; 1927, p. 184; 1934, p. 515; 1938, p. 784; 1944, p. 397; 1948, p. 593; 1954, c. 234; 1962, c. 242; 1970, c. 501; 1974, c. 311; 1975, c. 644; 1977, c. 475; 1979, c. 1; 1980, c. 332.)

I. LEGISLATIVE INTENT AND POWERS OF COURT.

Cross reference. — As to restoration of a party's former name upon a decree of divorce, see § 20-121.4.

Code Commission note.

Subdivisions (2), (4), (5), (7) and (8) of § 20-91, referred to in the last paragraph, were deleted by Acts 1975, c. 644.

The 1977 amendment deleted "estate and the" following "concerning the" near the middle of the first sentence of the first paragraph, deleted the former third sentence of the first paragraph, which defined the word "estate," added subdivisions (5a) and (5b) of the first paragraph, added the present second paragraph, and inserted "or lump sum payment" in the present third paragraph.

The 1979 amendment deleted the former second sentence of the first paragraph, which read "Upon decreeing a divorce from the bond of matrimony, the court may allow either party to resume a former name."

The 1980 amendment added the second sentence in the first paragraph.

Law Reviews.

For survey of Virginia law on domestic relations for the year 1973-1974, see 60 Va. L. Rev. 1529 (1974). For survey of Virginia law on domestic relations for the year 1974-1975, see 61 Va. L. Rev. 1732 (1975). For a comment on married women's names, see 11 U. Rich. L. Rev. 121 (1976). For survey of Virginia law on domestic relations for the year 1975-1976, see 62 Va. L. Rev. 1431 (1976). For article, "Support v. Alimony in Virginia," see 12 U. Rich. L. Rev. 139 (1977). For article, "Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws," see 63 Va. L. Rev. 249 (1977). For survey of Virginia law on domestic relations for the year 1976-77, see 63 Va. L. Rev. 1418 (1977). For survey of Virginia law on domestic relations for the year 1977-1978, see 64 Va. L. Rev. 1439 (1978).

Section implements constitutional mandate. — Constitution art. IV, § 14, provides that "the General Assembly shall confer on the courts power to ... change the names of persons." The General Assembly has carried out its constitutional mandate by the enactment of § 8.01-217, and this section. In re Strikwerda, 216 Va. 470, 220 S.E.2d 245 (1975).

But is not exclusive. — Nothing in the wording of this section indicates that this is intended to be the exclusive statutory authority for a change of name. In re Strikwerda, 216 Va. 470, 220 S.E.2d 245 (1975).

Jurisdiction cannot be ousted, etc.

In accord with original. See Richardson v. Moore, 217 Va. 422, 229 S.E.2d 864 (1976).

Thus, noncompliance with alimony decree not excused by wife's acquiescence. — If a wife's active contractual consent does not excuse a husband's noncompliance with a court's alimony decree, a wife's passive acquiescence does not. Richardson v. Moore, 217 Va. 422, 229 S.E.2d 864 (1976).

Full faith and credit, etc.

In accord with 1st paragraph in original. See Newport v. Newport, 219 Va. 48, 245 S.E.2d 134 (1978).

But right of support survives foreign ex parte divorce proceeding. — The right of a wife to support is of such importance to the community, as well as to the parties, that it survives an absolute divorce obtained by her husband in an ex parte proceeding in another state. Newport v. Newport, 219 Va. 48, 245 S.E.2d 134 (1978).

The legal obligation of a husband to support his wife may not be extinguished by a court lacking personal jurisdiction of the wife. Newport v. Newport, 219 Va. 48, 245 S.E.2d 13 (1978).

Where a Nevada final decree of divorce was entered before, rather than after, permanent alimony was decreed for the wife by the trial court of Virginia, but where Nevada had no personal jurisdiction over the husband, the trial court was correct in according full faith and credit to the Nevada divorce decree insofar as that decree terminated the marital status of the parties, in decreeing that the Nevada court was without power to adjudicate the question of alimony, and in holding that the Nevada decree did not terminate the wife's right to support by the husband. Newport v. Newport, 219 Va. 48, 245 S.E.2d 134 (1978).

Applied in Gagliano v. Gagliano, 215 Va. 447, 211 S.E.2d 62 (1975); Alls v. Alls, 216 Va. 13, 216 S.E.2d 16 (1975).

II. SUPPORT AND MAINTENANCE.

A. In General.

Decree reversed and remanded for finding as to support and maintenance. — Where the chancellor denied support and maintenance payments without making any finding respecting the various factors required to be considered under this section, a no-fault divorce decree was reversed insofar as it failed to make a finding and adjudication as to support and maintenance and was remanded for such a finding and adjudication. Brooker v. Brooker, 218 Va. 12, 235 S.E.2d 309 (1977).

B. When Support and Maintenance May Be Recovered.

When judge must award support and maintenance. — Where the wife established her need for support and the husband's ability to provide it, and she is not shown to be guilty of misconduct entitling her husband to a divorce, the judge has no choice but to award the wife support and maintenance. Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976).

Findings of judge entitled to weight of jury verdict. — When judge hears the evidence ore tenus, his findings are entitled to the weight of a jury verdict and will not be disturbed unless plainly wrong or without evidence to support them. Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976).

Limiting award held error. — Where the record was devoid of any evidence that wife's need or husband's ability to provide for that need would substantially change within the immediate or reasonably foreseeable future, the trial court's action in limiting its award to two years was error as it was not supported

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of divorce under any provision of §§
9, § 5111; 1926, p. 105; 1927, p. 184;
918, p. 593; 1954, c. 234; 1962, c. 242;
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Findings of judge entitled to weight of jury verdict. — When judge hears the evidence ore tenus, his findings are entitled to the weight of a jury verdict and will not be disturbed unless plainly wrong or without evidence to support them. Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976).

Limiting award held error. — Where the record was devoid of any evidence that wife's need or husband's ability to provide for that need would substantially change within the immediate or reasonably foreseeable future, the trial court's action in limiting its award to two years was error as it was not supported by the record. Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976).

Misconduct forfeits alimony.

A wife forfeits her right to maintenance and support from her husband only if her misconduct constitutes grounds for divorce. Rowand v. Rowand, 215 Va. 344, 210 S.E.2d 149 (1974).

Desertion by wife. — A wife cannot elect to desert her husband's home and live separately from him and so destroy the matrimonial relationship and then expect the courts to direct him to pay her maintenance and support, unless she can show such conduct on his part to justify her relief from the matrimonial status. Stolfi v. Stolfi, 203 Va. 696, 126 S.E.2d 923 (1962).

C. Determining Amount.

The general rule, etc.

The applicable rule on awarding alimony requires a husband, within the limits of his financial ability, to maintain his former wife in the manner to which she was accustomed during the marriage. Robertson v. Robertson, 215 Va. 425, 211 S.E.2d 41 (1975). Butler v. Butler, 217 Va. 195, 227 S.E.2d 688 (1976).

There is no fixed rule, etc.

This section vests discretion in the trial court in awarding wife and child support so that such awards will not be reduced on appeal absent proof from the record in the case that the amounts are, as a matter of law, obviously excessive or unsupported by evidence. Ingram v. Ingram, 217 Va. 27, 225 S.E.2d 362 (1976).

The standards set forth in this section are basically the same tests which were traditionally applied in determining alimony and child support. Ingram v. Ingram, 217 Va. 27, 225 S.E.2d 362 (1976).

Needs of wife (now spouse), etc.

A fair allotment to a wife is determined by balancing her needs against the ability of the husband to pay, considering both his actual earnings and his capacity to earn, whether from his personal exertions or his property. Robertson v. Robertson, 215 Va. 425, 211 S.E.2d 41 (1975). Butler v. Butler, 217 Va. 195, 227 S.E.2d 688 (1976).

Awards to be based upon contemporary circumstances. — This section defines several standards for balancing the respective needs and capacities of the husband and wife. The balance must be struck and awards made upon the basis of the circumstances disclosed by the evidence at the time of the award. Section 20-109 grants courts continuing jurisdiction to modify awards where changed circumstances are demonstrated. This statutory scheme recognizes that comparative needs and capacities change as circumstances change, that changes are not fairly predictable, and that

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spousal support awards must be determined in light of contemporary circumstances and then, if necessary, redetermined in light of new circumstances. Jacobs v. Jacobs, Va. , 254 S.E.2d 56 (1979).

And not upon uncertain future circumstance.—A spousal support award which is premised upon the occurrence of an uncertain future circumstance ignores the design and defeats the purpose of the statutory scheme. Jacobs v. Jacobs, Va. , 254 S.E.2d 56 (1979).

In determining the obligor's ability to pay, courts are authorized by this section to consider not only earnings but also "earning capacity." But in doing so, it is not proper to consider what the obligor might ultimately receive as a "potential recipient" of a share of a trust fund. Jacobs v. Jacobs, Va. , 254 S.E.2d 56 (1979).

III. CUSTODY AND MAINTENANCE OF CHILDREN.

Both parents of a child owe that child a duty of support during minority. Featherstone v. Brooks, Va. , 258 S.E.2d 513 (1979).

"Rule" of Moore v. Moore is not rule of law. — The "rule" of Moore v. Moore, 212 Va. 153, 183 S.E.2d 172 (1971) that the best interests of a child of tender years are served by being with his mother is not a rule of law. Indeed, § 31-15, which provides that a court, in a child custody case, shall give primary consideration to the welfare of the child, expressly states that there shall be no presumption of law in favor of either parent. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

At most, the principle for which Moore stands is no more than a permissible and rebuttable inference, that when the mother is fit, and other things are equal, she, as the natural custodian, should have custody of a child of tender years. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

For case where evidence showed "other things were equal" so as to support award of custody to the mother, see Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

The welfare of the child, etc.

In all custody cases the controlling consideration is always the child's welfare. Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977).

In determining what is in the best interest, etc.

In determining the best interest of the child, the court must decide by considering all the facts, including what effect a nonmarital relationship by a parent has on the child. Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977).

The moral climate in which children are to be raised is an important consideration for the court in determining custody, and adultery is a reflection of a mother's moral values. Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977).

An illicit relationship to which minor children are exposed cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding. Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977).

Effect of child reaching majority. — The divorce court's jurisdiction over a child is eliminated ipso facto when the child reaches his majority. Moreover, the same event terminates, by operation of law, the prospective effect of the judicial support decree. The statutory limitation on the divorce court's authority to order payment of child support cannot be nullified by the entry of a support order during minority. Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975).

Court order controls over contract provisions. — When contract provisions as to child support entered into prior to the change in the age of majority were supplanted by a latter court order in a divorce suit entered after the change in majority, the court order controls and support payments were not owing for children over 18 despite contract's provision for payments until age 21. Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975).

Illustrations.

Although the evidence did not show that the mother was an unfit parent, it did show that her home was not as suitable for a young child as the father's home. Thus, the chancellor did not err in awarding custody of the child to the father, with visitation rights reserved to the mother. White v. White, 215 Va. 765, 213 S.E.2d 766 (1975).

§ 20-108. Revision and alteration of such decrees.

Law Review.

For survey of Virginia law on domestic relations for the year 1974-1975, see 61 Va. L. Rev. 1732 (1975). For survey of Virginia law on domestic relations for the year 1975-1976, see 62 Va. L. Rev. 1431 (1976).

This section expressly gives the court the continuing jurisdiction, etc.

In accord with 1st paragraph in original. See Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

In exercising power under this section, the

court may revise and alter its decree if a material change in condition and circumstances has occurred. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

A contract between the husband and wife cannot prevent the court from exercising power under this section. Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

The trial court cannot be precluded by agreement from exercising its statutory power under this section to alter child support under appropriate circumstances. Carter v. Carter, 215 Va. 375, 211 S.E.2d 253 (1975).

This section gives the divorce court continuing jurisdiction to change or modify its decree concerning the custody and maintenance of minor children, and a contract between husband and wife cannot prevent the court from exercising this power. Featherstone v. Brooks, Va. , 258 S.E.2d 513 (1979).

A divorce court has continuing jurisdiction during a child's infancy to provide for his support and maintenance. Cutshaw v. Cutshaw, Va. , 261 S.E.2d 52 (1979).

Revision permitted for material change in condition or circumstances. — In exercising power under this section the court may revise and alter its decree if a material change in condition and circumstances has occurred. Featherstone v. Brooks, Va. , 258 S.E.2d 513 (1979).

Effect of child reaching majority. — The divorce court's jurisdiction over a child is eliminated ipso facto when the child reaches his majority. Moreover, the same event terminates, by operation of law, the prospective effect of the judicial support decree. The statutory limitation on the divorce court's authority to order payment of child support cannot be nullified by the entry of a support order during minority. Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975).

Once the child reaches majority, the jurisdiction of the divorce court to provide for his support and maintenance terminates unless otherwise provided by agreement incorporated into the divorce decree. Cutshaw v. Cutshaw, Va. , 261 S.E.2d 52 (1979).

Modification of contracts for support of children beyond majority. — The legal obligation of a parent to support his children only during their minority does not preclude the parent from contracting to support the children after their minority. However, when such contracts are incorporated into support decrees by a divorce court, they can only be modified by that court to the extent of its jurisdiction. Cutshaw v. Cutshaw, Va. , 261 S.E.2d 52 (1979).

Apportionment of unitary award made pursuant to approved settlement agreement. — A court, without any necessity therefor, may not apportion a unitary award

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Appendix 12

AFFIDAVIT

To whom it may concern.

This statement is submitted in regard to my custody hearing in the Fairfax County Juvenile and Domestic Relations District Court, Fairfax, Virginia on 28 October 1981.

The hearing on 28 October 1981 was a result of contested custody motions presented by both parental parties concerning our son, who was 3 years and 11 months old at the time of the hearing. Prior to the custody hearing, the Juvenile and Domestic District Court of the County of Fairfax ordered a full custody evaluation report prepared by a court appointed investigator. The report concluded that both parties "could and would be equally good parents", but because the mother had been in "defacto possession" of my son since his birth, the court investigator recommended that there be no "change" in custody. The presiding judge of the Juvenile and Domestic District Court therefore ruled, as recommended by the custody investigator, that:

1. Custody be awarded to the mother.

2. Specified visitation be awarded to the father (alternate weekends, two mid-week visits per month, and certain holiday periods).

3. Specified amount of monthly child support be paid by the father to the mother ($400.00/month - my gross annual income at the time of the court decision was about $40,000).

There was no evidence presented that I was an unfit father. On the contrary, the court investigation found that I was a "devoted, loving, and conscientious" parent. The mother was also found to be equally competent. However, the scales of justice were "tipped" in her favor on the basis that no "change" in custody was indicated. The court chose to legalize a situation in which she had deserted

me and our house, taking my son with her, and had enjoyed "defacto possession" of my son for almost four years.

I believe the facts in my case, as recorded in the custody investigation report and in the final opinion of the court, demonstrate clear evidence that, because I was the male parent of two otherwise equally worthly parents, I became the victim of an act of sex discrimination.

In my case, there was no previous custody order concerning my son. The mother (my ex-wife) did not have even a temporary award of custody to legalize her position as the favored party. She had simply enjoyed continuous "defacto possession" and during that time she had permitted the father (me) to have only periodic visits. When it became clear that no reconciliation was possible, I began court action to obtain custody of my son. My son was only two years old at the time I initiated motions to obtain custody. It was some two years later before we met for the final custody hearing on 28 October 1981.

That long delay awaiting a final hearing was caused by various motions and continuances that accompanied my attempts to obtain a court order for a formal custody investigation into my case. I knew I needed to establish my credentials as a "capable parent". The custody investigation did in fact establish that I was an "equally capable" parent. However, the court acted as though the issue was to 'change' custody when in fact the issue presented to the court was to determine 'initial' custody. Moreover, in reaching its decision, the court announced as a "reason" that the existing arrangement was "stable" and should be continued. In other words the court "ratified" the old canard (I thought!) that "possession is the law". My dilemma as a male parent was neatly summarized by the custody investigator (a woman) when at one point she remarked to me, "If you want custody so much, why didn't you seek it earlier?" - then she paused

and answered her own question, "Of course, no judge would give a man custody of an infant unless the mother was unfit". So in a situation where neither the mother nor the father is "unfit" and in fact both are "equally capable", the man is fated to lose the custody determination because he faces an impossible "Catch 22" situation that is purely a function of sex roles - male or female. All other things being equal, the court will award "initial" custody of an infant to the mother. But as the child grows older and the father trys to obtain custody, he is confronted by the court logic that the child is already with the mother and such a "stable" arrangement should not be disturbed. In other words, as an "equally capable" male parent, you cannot obtain custody when a child is young because prejudice and court habits make it easy to rule: "Well, he's young now, so he ought to go with his mother." (the very language used tends to support a sexist decision - justice should be blind as to whether the parent is a "mother" or "father"). Yet when an "equally capable" male parent tries later to obtain custody, the "Catch 22" used by the court is: "Well, the child is already with his mother and has a routine established. We should not disturb it."

Where is it written that children are unable to adapt to the daily patterns of two equally capable parents? Most sociological findings on the topic show that children are far more adaptable than adults. I suggest that a more likely example of difficulty with adapting to changes is demonstrated by court custody decisions that seem to rigidly disregard the changed roles of male and female parents in our society.

For the reasons cited above, I believe that the court logic upon which the custody of my son was awarded to the female parent (my ex-wife) is another

example of sex discrimination against a male parent (me). Even though this discrimination was sanctioned under the guise of a compassionate court decision for the "good of the child", it was sexist discrimination nevertheless.

I would be pleased to personally testify further about this issue if requested.

James L. May

JAMES L. MAY
3817 Segundo Place
Alexandria, VA 22309

Sworn to and subscribed before me this 21st day of May, 1981.

Witness my hand and official seal.

James L. Whittle Notary Public

My Commission Expires June 30, 1984

Appendix 13

AFIDAVIT

Regarding my custody hearing in the Circuit Court of the Fairfax County, Virginia on April 29, (Appeal of the Custody #389).

It was a contested custody over our 3 year old son.

Evidence showed that my wife commited adultory and purgery.

Court order was: 1. Custody awarded to the mother;

2. Reasonable visitations to the father.

There was no evidence that I am "unfit" father. I could provide better living and care conditions and spent more time with my son. Yet custody was awarded to my wife with so called "reasonable" visitation rights for me, which constituted an act of discrimination against father in favor of mother.

There was no opinion of the Court where evidences were weighed to justify the Court decision. A social worker, appointed by the Court, was the only expert witness and equally bias to male parents. Such court hearing has violated due process.

My son's needs and my wife's and my financial abilities were not properly examined. At the first hearing I was ordered to pay amount of child support which was higher than my take home pay. This was an abuse of the Judge's discretion. Abusing his discretion the Judge compelled me to contempt his order.

Signed

Joel Halsband

Joel Halsband
8422 Snowden Oaks
Laurel, Md. 20311

Virginia Freund 6/19/81.

MY COMMISSION EXPIRES JULY 1, 1982

Appendix 14

AFFIDAVIT
by
Paul M. Robinson, Jr.

I am the president of Fathers United for Equal Rights of Northern Virginia and the District of Columbia, a nonprofit organization incorporated under the laws of Virginia.

The purpose of this organization is to work for equal rights for fathers under the law, especially rights concerning custody of children, for equitable arrangements for visitation with children by noncustodial parents, grandparents, and others, and for effective enforcement of such visitation arrangements, the level of child and/or spousal support when such support is appropriate and ordered, and for the equitable assessment of counsel fees without regard to the sex gender of the parent when such assessment would be appropriate.

In general, Fathers United supports measures which encourage family stability, minimize litigation, and encourage the peaceful and just resolution of family differences.

In my continuous work in this organization since 1972 and in this chapter since 1976, I have become aware that the state courts of Virginia regularly discriminate against fathers in the matter of custody. While neighboring jurisdictions (the District of Columbia and Maryland) have abandoned the maternal preference or tender years doctrine in the appellate case law, the Virginia Supreme Court of Appeals has reaffirmed that doctrine in McCreery v. McCreery, 218 Va 352 (1977). The maternal preference doctrine that was first enunciated in Virginia in Mullen v. Mullen, 49 SE2d 349 (1948).

The McCreery decision contains a new construction of the meaning of a custody award which apparently attempts to remove the matter of a custody decision from the reach of the Virginia equal rights provision as contained since 1971 in Article I, Section 11 of the Virginia Constitution and from the Equal Protection of the Laws provision of the Fourteenth Amendment to the Constitution of the United States as interpreted in Frontiero v. Richardson, 411 US 677 (1973).

McCreery acknowledges and confirms that natural parents have a superior right to custody vis a vis the custody claims of others, but then states that between natural parents, the right of a parent to custody does not exist. Between natural parents the award is not custody of a child to a parent, but the award of the custodial care of a parent to a child. This construction, according to the Supreme Court of Appeals of Virginia, is intended to further the "best interests of the child." The Court states that a custodial care award to a child has nothing to do with the rights of the parents. But the Court limits this concept to custody contests between natural parents. It does not say that in a contest between a natural parent and another person,

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the best interests of a child will prevail over the parental rights of a fit parent. In summary the court is saying: "In a contest between a parent and a nonparent a right of custody exists. However, in a contest between a natural father and mother a right of custody does not exist. In a contest between a parent and a nonparent the right of custody of a fit parent prevails over the best interest of the child. In a contest between two natural parents the best interests of the child prevails over any right of custody."

As the minority stated in the landmark case of Mullen it is in the best interest of a child to be raised by both parents. Fortunately, both parents normally wish to participate in the care and upbringing of their children, and this desire acts to bring about a resolution of differences. If one person knows that regardless of how they behave in a marriage they will be given custody of the children (or have their custodial care awarded to the children), the factors predisposing to a resolution of differences will have been removed. That, unfortunately, is the result of the maternal preference doctrine as correctly foreseen by the minority in Mullen.

Thus the Virginia Supreme Court of Appeals has taken the position that the maternal preference doctrine is immune from the equal rights provision of the Virginia Constitution and from Section 31-15 of the Code of Virginia which states that neither parent shall be favored. This authoritative ruling by the Virginia Supreme Court of Appeals is sufficient to show that men as fathers are being denied due process and equal protection of the laws guaranteed by the US Constitution. The Federal Courts should move to protect men from abridgement of their Constitutional rights.

In awarding the custodial care of one parent to the child, the court often makes high and sometimes confiscatory awards of child support to be paid by the noncustodial parent to the custodial parent. The levels of child support do not appear to be rationally related to the needs of the child or children. The awards appear in many cases to be arbitrary and clearly inequitable. The legislature has not furnished guidelines, and the courts in Northern Virginia have not judicially narrowed this vague and overbroad authority to award child support. This situation is particularly unjust when one parent has removed the children without cause and kept them from the other parent. I know of one situation where a judge has ordered a level of child support for one child in excess of the takehome pay of the other parent who was working full time at full skill when there was no other income to the noncustodial parent and where the custodial parent had a higher income than the custodial parent.

These awards are made contrary to the leading case of Butler v. Commonwealth Va , SE , 22 ALR (1922) which has never

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been overruled. In Butler the Virginia Supreme Court of Appeals stated that "A father has the obligation to support his wife and children in his own home and cannot be compelled to do so elsewhere against his will unless through his misconduct he is responsible for driving them from the home," and "the obligation to support arises largely from custody and control." After 32 years it is time to revisit Mullen and reconcile it with Butler.

Subscribed and sworn before me, a Notary Public, in and for the State of Virginia County of Fairfax, on this 26th day of August, 1981 by the above named.

Marian L Barnett
Notary Public

My Commission Expires November 28, 1984

Paul M. Robinson, Jr.

Paul M. Robinson, Jr.
President
Fathers United for Equal
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Appendix 15

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED

APR 17 1981

CLERK OF THE CIRCUIT COURT
OF FAIRFAX COUNTY, VA.

MICHELLE M.ETLIN, Complainant and Cross-Defendant	
v.	IN CHANCERY NO. 68775
VLADIMIR N. ETLIN, Defendant and Cross-Complainant	

MOTION TO STAY PROCEEDING

COME NOW Defendant/Cross-Complainant, Vladimir N.Etlin, pro se, and move this Court to to stay all proceedings in the case until after the Federal Court has spoken persuant to the U.S.Supreme Court ruling;and in support whereof sas as follows:

1.) The Court lacks jurisdiction over the subject matter in this action,because:

a.) Defendant/Cross-Complainant, Vladimir N.Etlin,has filed his Complaint on March 17,1981 in the United States District Court for the Eastern District of Virginia to resolve some federal questions on the subject matter; and the mere pendency of proceedings in Federal Court automatically divests the State Court of jurisdiction to bind the parties:

England v. Louisiana State Board of Medical Examiners,375 U.S.413, 84S.Ct.461; 11L.Ed.440(1964)

The Supreme Court said:

> Once issue has been joined in the federal court,no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question.Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant.

see also;:

Harris County Commissioners Court v. Moore, 95 S.Ct. 870,877n.(1975).

Respectfully submitted

VLADIMIR N. ETLIN
pro se
7403 Lisle Ave.
Falls Church,VA.22043

Tel: 356-3106

Appendix 16

PROCEEDINGS

(Whereupon, the Court Reporter was sworn.)

MR. AIN: May it please the Court, Your Honor, Sanford Ain on behalf of the complainant, Michelle Etlin. If I may take a few minutes and make a brief opening, Your Honor, to indicate to the Court what the evidence will show and to put this matter in perspective, I think it will be helpful to the Court.

This matter comes on today on a rule to show cause which was issued by Judge Jennings several weeks ago and served upon Mr. Etlin. It was originally docketed for hearing last Friday. The matter was docketed for hearing before Judge Griffith. When we appeared in court last Friday, Judge Griffith called us to the bench in the preliminary docket call and informed me for the first knowledge I had that he would have to recuse himself from hearing this case in view of the fact that Mr. Etlin had seen fit to sue Judge Griffith, the Governor of the State of Virginia, and the Attorney General of the State of Virginia in the Federal District Court. That suit, Your Honor, Judge Griffith informed me resulted from a custody trial which lasted two full trial days in this past January, January of 1981. The hearing dates, Your Honor, were the 15th and 20th of January.

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hearing

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You may well have to either get a cheaper place to live or get a second job working a couple of evenings a week in order to make these obligations. But I want you to understand that in the future, you are going to make these payments or there are going to be drastic results.

Now, so far as this particular contempt is concerned, if you make all future payments, you can safely predict that I'm not going to do anything about it. If you don't, and Mr. Ain has you back in here again for not paying as ordered by Judge Griffith, then you can rest assured you are going to jail. Those are the only two options you have.

MR. AIN: Your Honor, I have a proposed order that I would like to submit for the Court just on the judgment portion. I'm sorry, Your Honor. I will wait --

THE COURT: (Interposing) I'd rather you go ahead and do an order with the judgment and saying that I'm taking it under advisement, the other part and the various things that I actually did.

MR. AIN: Very well.

THE COURT: Mr. Etlin, if you come back in here again and you haven't paid and you get me, at least, which you probably will, I want you to understand that you probably ought to bring a lawyer with you because if you haven't paid

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for a good reason, then you are going to jail.

Now, if you are sick or something like that, that's totally different. But because your housing expenses and other expenses are too high, that's not a good enough reason not to pay your child support.

MR. ETLIN: May I answer?

THE COURT: I mean that's my ruling. That's it. I haven't done anything to you today, Mr. Etlin, except enter a judgment for the amount you haven't paid. I mean the next time is going to have serious consequences.

MR. ETLIN: I know, but I would appreciate at least if you can show me how could I cut down those expenses so I will not be here next time, because otherwise, I will be definitely here.

THE COURT: To me, Mr. Etlin, you have got a pretty good job. If it were me, I think I would go get a job working at a 7-Eleven a couple nights a week or something and earn the additional money you need to make this child support. That's a rough thing to do, but a lot of people in this world have to do it.

Maybe you can talk with Mr. Ain, and you can agree on some way to pay this arrearage or he will give you a month to find an additional job. The last thing I want to do

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two thirty and the only thing I know -- I haven't even read the Bill of Complaint ~~or anything~~ yet.

MR. ETLIN: Your Honor, may I also say for the record to what Mr. Ain said. Yesterday I called him and I explained to him the situation. I said if he doesn't waive this alimony rights I will go for a contested. So it's better if we continue it. So he knew in advance. So all this comment here, that's his idea.

THE COMMISSIONER: But you did make a stipulation with him on May 5th. I don't really feel sympathetic for you and I'll tell you why. Because you've had lawyers, you've been consulting with lawyers. And I think there is nothing worse for another lawyer is to have lawyers consulting somebody in the background and not appearing in the record. And I think it's unfair. And, you know, it's unfair to the lawyer on the other side.

You know, you come in and say you want -- you know, we're ignorant of that. You are ignorant of that and you're getting this advice on the side. And this is, you know, from what you told me today and it's just -- it's tough for the lawyer who's in the case when he doesn't have another lawyer to deal with yet you're consulting with another lawyer.

May 14, 1981 hearing

I'm going to do. I'm going to let you proceed today on your -- I assume that counsel for the Complainant is not ready to proceed on his original grounds today. And I assume because he came here expecting a one year separation that I'm going to make you, as a condition of doing that, advance all of the costs for the court reporter, for your hearing and his hearing. And you're going to have to advance them all.

That's the only way I know to fairly do this thing to make it fair. And you're going to have to then pay all of his costs. And I think that is fair.

I'll tell you the reason I am letting you do it, to do this. I'm probably leaning over backwards and I probably am wrong in doing it. But I believe as the old saying goes, let everybody have their day in court.

But the only way I'm going to let you do it, because you put these people in a bad position, is you're going to have to pay the court reporter for both the hearing today and for the hearing when he comes back.

MR. ETLIN: For the court reporter?

THE COMMISSIONER: For the court reporting. And you're going to have to pay my fee.

MR. ETLIN: All right. But not Mr. Ain's fee?

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a Commissioner's hearing he is getting free legal advice in the filing of these motions.

One of his stated purposes in this proceeding is to bankrupt his wife with legal fees. He's been filing motions after the custody hearing.

He refused to comply with Judge Griffith's order. He f'red his lawyer, filed a suit against Judge Griffith for the decision Judge Griffith made.

We came back on a rule to show cause on April 17. It was set before Judge Griffith. Judge Griffith at that point received a motion from Mr. Etlin to recuse himself because of the suit that Mr. Etlin filed against Judge Griffith. Judge Griffith recused himself.

We came back again on April 23 on a rule to show cause. We were given a judgment against Mr. Etlin for arrearages in support. He has yet to comply with the support order in January.

THE COURT: Did you get attorney's fees?

MR. AIN: We got attorney's fees in connection with the rule to show cause.

THE COURT: Have they been paid?

MR. AIN: We have not been paid.

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THE COURT: The only way you can get a change in support and maintenance is to show a change in condition since January. You will only be entitled to documents and evidence that will show a change in conditions and circumstances since January and not prior to January.

MR. ETLIN: That's correct, Your Honor. And that's what I'm requesting from your client, to produce documents to show that she purged in court --

THE COURT: (Interposing) She what?

MR. ETLIN: She lied to the Court.

THE COURT: We're looking at a change in conditions.

MR. ETLIN: That's a change of conditions becaus she showed different assets she has.

THE COURT: I'm not letting you have anything prior to January. Any income tax returns, statements from employers, cost of living, receipts, leases, any of that you may have since January to show a change of conditions in the living standard that would be reduced which in turn would reduce your obligation in support and maintenan you are entitled to.

MR. ETLIN: But I cannot show changes -- we didn't have evidence what she had on that day in January

May 29, 198 hearing

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MR. ETLIN: She showed that document in March 1980. And Exhibit A in that document shows here that she had $100,000. On March 5, 1980 she showed the same document to my lawyer that she had only $2[illegible],000.

So it was lying to the Court and the Court didn't have proper picture what she have actually. And we know that she has more than hundred thousand dollars -- approximately $200,000.

So that's why I'm asking for these documents to produce because we never had them.

THE COURT: You can only get documents since January because you had a full and complete hearing. Twenty-one days has expired. And for a new hearing on that, the only thing you can do now is go by change of circumstances.

Now, if this is a change of circumstances, then you can come in on that as a change of circumstances, Mr. Etlin.

Were you represented by counsel in January?

MR. ETLIN: Yes, I was represented by counsel. And now because of complainant dragging me in this court continuously, I'm not able to hire a lawyer any more.

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1205, however, concluded that Article V shall become effective on January 16, 1977, and that statutory provisions currently effective will remain in full force and effect until that time. See Appendix A. The controversy is, therefore, still a live one and cannot be dismissed for mootness.

EXPERT TESTIMONY

Plaintiffs Wambles and Roe have submitted the testimony of witnesses Dr. Sally A. Provence[5] and Dr. Albert J. Solnit[6] as experts in the field of child care and development. Drs. Provence and Solnit summarized their views as follows:

1. Summary removal of a young child from a parent who has been his major caregiver is a severe threat to his development. It disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love.

2. Summary removal should be allowed only under conditions in which physical survival is at stake.

3. In situations in which some interference is indicated because parents are unable to take good care of their child, there are alternatives to summary removal which should be used either singly or in combination. Among these are the following: (a) the provision in the child's home of assistance to parents with child care and with managing a household; (b) the provision of counselling to parents about how to care for a child in ways that enhance his development and well-being; (c) the provision of a day care center or day care family in which assistance to child and parent can be provided which is addressed to their specific needs; (d) the provision of a residential facility or foster family in which both parent and child can receive the nurture and guidance they may need (in extended families, relatives often supply such benevolent help, and when they are unavailable, it is one of society's responsibilities to organize and make available such assistance); and (e) the provision of 24-hour substitute care for a child, which does not cut him off from contact with his parents.

Another witness, Dr. Jonas Robitscher,[7] gave similar testimony in his deposition:

All authorities agree that there are circumstances under which summary removal of the child from his or her parent should be allowed. These circumstances would include and would be very much limited to situations in which the child was being physically abused as in the battered-child syndrome, where the child was being sexually abused as in the examples we see of stepfathers or sometimes real fathers having incestuous relationships with children, when children are brought up in an atmosphere incompatible with physical health because of neglect, lack of food and extreme uncleanliness, and when there is so little care taken of the child that the child is in danger as when small children are allowed to roam unsupervised in dangerous streets. However, most authorities agree that even psychotic or disturbed mothers can often do a good mothering job and psychotic and disturbed mothers are preferable, providing the circumstances described immediately above are not present, to institutional or impersonal

5. Dr. Sally A. Provence is professor of pediatrics at Yale University Child Study Center and Director of the Child Development Unit, author of Guide to the Care of Infants in Groups (1967), and co-author of Infants in Institutions. For the past 25 years, she has been involved in clinical work with children and parents in child development research.

6. Dr. Albert J. Solnit is Sterling Professor of Pediatrics and Psychiatry and Director of the Child Study Center at Yale University. In this capacity, he teaches child development, child psychiatry, family law, and child psychoanalysis. Dr. Solnit has published, in corroboration with Dr. Milton J. E. Senn, a textbook, Problems in Child Behavior and Development (1968), and, in corroboration with Drs. Goldstein and Freud, a book entitled, Beyond the Best Interests of the Child (1973).

7. Dr. Jonas Robitscher is a Henry R. Luce, Professor of Law and the Behavioral Science at Emory University Schools of Law and Medicine.

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Appendix 22

COOPERATIVE PARENTING FOLLOWING DISSOLUTION:



YOUR CHILD NEEDS BOTH OF YOU

Prepared by the Los Angeles Committee
to Implement California's
Joint Custody Statute

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The Conciliation Court

MARRIAGE AND FAMILY COUNSELING SERVICES
SUPERIOR COURT, COUNTY OF LOS ANGELES
111 NORTH HILL STREET, ROOM 261, LOS ANGELES, CA 90012
(213) 974-5524

Dear Parent:

This pamphlet is designed to help you understand California's law regarding the needs of your children before, during, and after dissolution. We hope this information is helpful to you.

Where children are involved, divorce is not the end of your family; it is a reorganization. Much will be gained by your working together as parents to help your children become caring, responsible adults.

This pamphlet was prepared by a committee of judges, mental health professionals, attorneys, and parents with years of experience in working with parents going through the process of divorce. The task of all parents, whether or not, their marriage continues, is a responsible one. If you have a good relationship with your children and they feel your love and acceptance, they will thrive and grow.

Sincerely,

Supervising Judge
Family Law Department
& Conciliation Court

COOPERATIVE PARENTING PAMPHLET

Divorce is not the end of a family. It is a reorganization. Children benefit enormously when the parents cooperate. Children can be injured when the parents do not cooperate. This pamphlet will make it easier to cooperate by briefly explaining the law and giving you some guidelines to make it work for your family.

Trained and experienced family counselors are in the community and in the Court who may give you as much help as you need to make a custody arrangement for your family.

WHAT IS THE LAW?

The law gives you the opportunity to make your own custody plan, or if the two of you cannot agree, either of you can suggest your plan to the Court. If the two of you make a custody plan which follows the guidelines in the law, the Judge will accept your plan. If you cannot agree to a plan which follows the guidelines after conferences with a Conciliation Court counselor, the Judge will make the decision.

The basic rule in child custody is that the plan must be in the best interest of the child, including consideration of the child's individual abilities and needs. Although the parents are divorced, the declared public policy of the state is to assure children frequent and continuing contact with both parents and to encourage parents to share the rights and responsibilities

of child-rearing. These, in a nutshell, are the guidelines in the law.

You may have read, or heard about, "joint custody," and are wondering whether it will work for your family. There are many different kinds of joint custody arrangements, which involves sharing time with the children, and sharing responsibility for them, equal sharing of time may be a good arrangement for your family depending upon the needs and capacities of your children. Another joint custody plan may allow for the children to spend more time with one parent, although both parents continue to share the major decision-making responsibility regarding the children. If the judge decides to award custody to one parent, among other factors, the judge will consider which parent is more likely to allow the children frequent and continued contact with the other parent.

Whether your custody plan is joint custody, or sole custody to one parent and visitation to the other parent, both parents are entitled to equal access to children's medical, dental, school and other records.

Remember that it is in your child's best interest that each parent has frequent and continuing contact with your child. This is what we mean by the term, "cooperative parenting," because it describes how parents may best help their children regardless of the plan for sharing responsibility. The main concern should always be what is best for your children. Any plan should be continually evaluated and adjusted according to your children's needs.

The full text of the law may be found in section 4600, and 4600.5 of the Civil Code. Your local library should have this volume.

WHAT ARE THE NEEDS OF PARENTS IN THE DISSOLUTION PROCESS?

The process of divorce from the painful moment parents decide to end their marriage to the actual physical separation of family members – and afterward – is emotionally and financially stressful on everyone in the family: mother, father, and children.

Parents are often angry, hostile toward each other, and unhappy during the dissoulution and each may think that his or her suffering is deeper and more longlasting than that of the other. Each parent may be experiencing a sudden wrenching apart and loss of a lifestyle that had been built over a period of years and that had served as an anchor to his, or her, life. Both parents are likely to feel abandoned and frightened about the future. The physical separation may leave both unsure of themselves and concerned over what the divorce may mean for their children.

Parents often face a new position as single parents in their community and the necessity of trying to build a new life, frequently with no one to turn to for support. Women who have not maintained a job outside the home in addition to that of being a homemaker and parents are faced with the task of building a new career, a new identity, and providing for their own support. When the mother has the entire task of raising the children, she may feel this responsibility is an awesome burden. Sometimes, having to cope with all these tasks at the same time becomes so overwhelming that some parents stay angry and depressed. Many may even find it very difficult to begin the task of rebuilding their lives.

The trauma fathers often experience can be equally painful. Earnings which may have been enough for one household, especially a one-income family, may not be enough for two homes. Fathers may find this increased financial burden very difficult. In addition, most parents look to their family for the closeness, warmth, and nurturing in their lives. It is difficult and depressing for parents who leave the household after divorce to be suddenly alone in a strange place after having been surrounded for years by the warmth of the home and children. For parents whose former spouse moves out of the house and who may be unaccustomed to household and day-to-day parenting duties, adjusting to this unfamiliar lifestyle can be overwhelming and bewildering. On the other hand, parents — fathers, *or* mothers, — and especially those who have been involved in day-to-day care and nurturing of their children, find that separation from their children can be particularly painful for both the absent parent and their children.

Since each parent feels lonely, depressed and abandoned, they cling to the children and have trouble sharing them with each other. Each parent feels that contact with the children is a protection against the terrible loneliness and isolation while they are adjusting to their new lives. This is normal and understandable. The problem is that it is not the best thing for the children since it creates in them the feeling that they are desperately needed by each parent and the children feel a conflict because of loyalty to both parents.

Although it may be very difficult at a time when both parents are feeling hurt and angry, both parents need to try to stop blaming each other for what went wrong with the marriage, mourn its loss, and begin to work cooperatively toward a new and more successful relationship as *parents* of their children. Family counseling can be of help to divorcing parents in terms of understanding and coping with the stress which all members of the family feel at the time of the dissolution.

Some parents are afraid of "losing the child" in a joint custody arrangement. On the contrary, cooperative parenting should encourage mutual support and continuing contact with the children and does not mean "losing the child." In fact, joint custody may even make the job of parenting less stressful because it is shared.

WHAT ARE THE NEEDS OF CHILDREN FOLLOWING DISSOLUTION?

Following divorce, children can be severely threatened with fears about what the future holds for them. Even if a child does not say it out loud, the question a youngster experiencing divorce wants to ask is: "Who will take care of me?" Children want to know if they will still be able to see both parents. In addition, children normally attached to both parents are sad, disillusioned and experience great loss through separation from one of the two most important adults in their lives. Because of this, children may act younger or differently than they did before the parents decided to end their marriage. This change in behavior may show in various ways: Young children may suddenly start clinging to one, or both, parents. Older children may show the effects of the family breakup and the loss of one parent by having difficulty with schoolwork or with relationships with family and friends.

One way to minimize the stress and avoid long-term problems for children of divorcing families is for the youngsters to maintain continued and *conflict-free contact* with both parents. This will reassure the child of the continuing love of both parents and make it clear that he or she has not been abandoned by either parent.

However, as parents struggle to work out new cooperative parenting arrangements, mothers and fathers may notice that their children show unusual behavior before or after spending the time with one or the other of them. Each child will react differently. For example, a child may seem upset, having trouble sleeping or eating for a brief time, or seem withdrawn after being with one parent and the shifting to the other. This stress and unhappiness shown by the child does not necessarily mean one or both parents are not doing a good job of taking care of their children. It means that this is a particularly important time when children need the comfort and support of both parents working together to ease the strain on everybody while all members of the family go through the process of reorganizing their lives. It takes patience, open communication – and time – for children as well as adults, to adjust to such significant changes.

Parents can greatly help their children by trying to understand each child's individual needs and abilities at a particular age. Children need to be as free as possible from the bitterness and resentments that may continue to exist between fathers and mothers who are divorcing. The best way to do this is for parents to keep from making negative remarks about the other parent in front of the children, or blaming the other for the divorce. Working together cooperatively as parents – which is what is truly meant by "joint custody" – may lessen the danger of long-term harm to your children from your divorce, and may help speed up the process for both parents and their children to feel good about themselves again.

DEVELOPING A COOPERATIVE PARENTING PLAN

Finding new ways to resolve disagreements over child custody issues takes time, it takes a commitment from both mother and father and it may take help from others who understand the difficulties in learning to cooperate as parents when couples cease to be spouses. Agencies such as the Conciliation Court, family counseling agencies, divorce family clinics or parenting workshops are to help parents develop a cooperative parenting arrangement.

Suggested steps for developing a cooperative parenting plan:

1. Sit down and identify the needs of your children, which are different from your needs.
2. Think of your role as parents, not as spouses, and try to separate feelings of anger and hurt to keep them from interfering with making decisions as parents. Seek help if you cannot.
3. Review what you have done together as parents that worked.
4. Develop an arrangement that continues this plan where it was successful and provides continuous, ongoing contact with both parents. Put it in writing.
5. Think in units of time – work, school, vacation, and where possible, share the responsibility for your children's care around these natural transitions, as well as other responsibilities, such as dental, medical appointments, etc.
6. Establish a pattern that works and follow it, but be flexible if situations change without insisting on a "fifty-fifty" division.
7. Communicate regarding important events in your child's life, or in you own life that may affect your children.
8. Develop a way to talk over problems between you and the other parent without involving the children. Be sure to share the "high points" and successes that the other parent may not have seen.
9. Anticipate change and plan for it. Your child's growth will require you to do so. Work to adapt your plan to your child's needs.
10. Problems are bound to arise; when things go "wrong," focus on "what is wrong" not "who is wrong."
11. Bury the past, and deal primarily with today and tomorrow. Try to consider everyone's needs, but make your decisions in what is in the best interest of the children.

FOR ADDITIONAL INFORMATION

Contact your attorney, the Los Angeles County Conciliation Court, 974-5524, or any of the family counseling services listed in the United Way INFO Directory.

Books that may be of value:

Custody Handbook, Persia Wooley

Disposable Parent, Mel Roman

Co Parenting, Miriam Galper

Joint Custody: One Way to End the War, Ciji Ware

Mom's House; Dad's House, Isolina Ricci

Surviving the Breakup, Judith Wallerstein and Joan Kelly

My Mom and Dad Are Getting a Divorce, Florence Bienenfeld

Many other excellent books are available.

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A FINAL THOUGHT

"Your children are not your children. They are sons and daughters of Life's longing for itself. They come through you but not from you, and though they are with you, they belong not to you. You may give them your love but not your thoughts, for they have their own thoughts. You may house their bodies but not their souls, for their souls dwell in the house of tomorrow which you cannot visit, not even in your dreams . . . . . for life goes not backward nor tarries with yesterday. You are the bows from which your children as living arrows are sent forth."

Kahlil Gibran

Prepared by the Los Angeles Committee
to Implement California's
Joint Custody Statute
Appointed by Hon. Billy G. Mills
Supervision Judge, Family Law

Hugh McIsaac, Chairman; Dr. Gary Chase, M.D.; James Cook; Marine Baker-Jackson; Stephen Kolodny; Honorable Frances Rothschild; Edith Swerdlow, Out Ware; Nancy Weston; Dr. Frank Williams, M.D.

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Appendix 23

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No. 106
Vol. 10, 1980

Volume X
Publication No. 106
November 1980

Divorce, Child Custody and the Family

Formulated by the
Committee on the Family
Group for the Advancement of Psychiatry

MENTAL HEALTH MATERIALS CENTER
30 East 29th Street, New York, N.Y. 10016

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STATEMENT OF PURPOSE

THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY has a membership of approximately 300 psychiatrists, most of whom are organized in the form of a number of working committees. These committees direct their efforts toward the study of various aspects of psychiatry and the application of this knowledge to the fields of mental health and human relations.

Collaboration with specialists in other disciplines has been and is one of GAP's working principles. Since the formation of GAP in 1946 its members have worked closely with such other specialists as anthropologists, biologists, economists, statisticians, educators, lawyers, nurses, psychologists, sociologists, social workers, and experts in mass communication, philosophy, and semantics. GAP envisages a continuing program of work according to the following aims:

1. To collect and appraise significant data in the fields of psychiatry, mental health, and human relations
2. To reevaluate old concepts and to develop and test new ones
3. To apply the knowledge thus obtained for the promotion of mental health and good human relations

GAP is an independent group, and its reports represent the composite findings and opinions of its members only, guided by its many consultants.

DIVORCE, CHILD CUSTODY AND THE FAMILY was formulated by the Committee on the Family which acknowledges on page 792 the participation of others in the preparation of this report. The members of this committee, and the members of the other GAP committees as well as additional membership categories

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INTRODUCTION

Family disputes comprise the largest category of civil matters handled by our overburdened legal system. Over half of the cases filed in our trial courts of original jurisdiction are concerned with matrimonial actions, that is, divorce or legal separation;[1] these ordinarily involve issues of child custody and visitation rights. Even where the parents agree on custodial and visitation terms and court approval is routine, changed circumstances may lead to petitions to modify prior custodial orders.[2]

Current statistics show that one out of every three marriages will end in divorce, that this proportion is steadily increasing, and that a majority of these divorces involve children.[3,4] The situation is most serious in California where it is estimated that one out of two marriages will fail and that 70 percent of these will involve children under twelve.[5] As a result, a growing number of children are becoming children of divorce, a fact that has staggering implications for future generations.[6] The determinations of custody for these children are crucial to their development and future mental health.

This report will consider the custody problems of two types of divorces—the "amicable" ones, in which parents are able to come to an agreement about the care and custody of the children, and the contested ones, in which differences are irreconcilable and decisions about child custody have to be made by the courts. Special attention will be focused on current thinking in psychiatry and the potential contribution of mental health professionals to the determination of custody.

In these considerations, the term "custody" has two meanings. The first and traditional meaning is the control of and the

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right to make decisions about the child, with the recent practice of one parent having primary care and responsibility and the other parent usually having rights of visitation. The second meaning—more important but less obvious—is that of meeting the child's needs, including that of access to both parents. This second meaning is often forgotten because the parents, while fighting each other, tend to see the child's needs as linked to their own individual positions. Moreover, they each have their own advocates, but the child usually has none.

Legal decisions about child custody are the responsibility of the courts, and, through the ages, the legal-judicial system has developed its own principles for deciding about child custody. They are based on centuries of experience in similar situations and on common sense reasoning about human nature. These principles serve as guidelines for decisions when emotion is high and conflicting interests cloud the picture. In discharging its responsibility, however, the legal-judicial system relies not only on these principles, but also on the best available knowledge at any given time.

In this century, the fields of psychiatry, psychology, and the social sciences have developed rapidly. These bodies of knowledge are focused primarily on understanding the life of the individual from birth to death, and the favorable and unfavorable events that influence the course of a life. Some of the building blocks on which many psychological theories rest are findings about emotional forces that may seem to run counter to earlier reasoning about human behavior, for example, the concept of the unconscious. Nevertheless, some of the concepts from psychological and psychiatric theory have gradually been incorporated into the legal principles that govern child custody decisions. To date, the prevailing psychological-psychiatric theory offered to the courts has been based primarily on the study of the individual.

During the past twenty-five years, a new "family" orienta-

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tion for understanding human adaptation and development has evolved. This view supplements what is known about the life of the individual through a study of the entire family and its multigenerational antecedents. This kind of family orientation, known also as family systems theory, provides important new dimensions for understanding and dealing with problems of coping and adaptation, including those that arise when a family breaks apart.

The emotional processes that result in divorce are set in motion long before the divorce becomes an overt threat or a reality. The family difficulties that lead to divorce are themselves traumatic for all concerned. Decisions about child custody—even without disputes—are among the most difficult of all human decisions. They almost always involve an extensive network of family relationships—old and new. Litigation, especially if bitter and prolonged, can add its own adverse effects to the problems of the family, reaching beyond parents and children to involve grandparents and others in the extended family. And, since the final legal divorce does not end the emotional relationships, these effects may continue far into the future, especially when children are involved.

This report is written for all who become involved with family disruption and divorce where children are affected. It is designed to convey an overall view of the family emotional processes which encompass every member of the family before, during, and after divorce, and which, if understood, can contribute to better decisions about child custody.

Among those most involved in emotional events that lead to divorce and child custody decisions are mental health professionals*—on the one hand—and lawyers, judges, and other personnel connected with family courts—on the other.

*We will use the term "mental health professional" to mean anyone trained and working in the field of mental health and illness, most commonly a psychiatrist, clinical psychologist, or a psychiatric social worker.

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What these authors do not recognize is that, in these disputes, we are usually dealing with two psychological parents, a mother and a father. The research cited above, particularly the Wallerstein-Kelly studies, demonstrate the adverse effects of cutting the child off from one of his or her psychological parents. The child needs both parents.

Secondly, the proposal that the custodial parent determine the contact of the child with the other parent fails to take into account the fact that the child has a right as well as a need for contact with both parents. Parents may divorce each other for their own reasons, but in that process, they do not have the right to force their children to divorce the other parent.

Thirdly, the assumption that, once a custody decision has been made, courts should not intervene except in cases of neglect or abandonment, does not take into account the fact that the children of divorce are children "at risk" and that society has a legitimate concern about their welfare and development.

Conclusion

The evidence and our own experience lead us to what can be called the family perspective on divorce and custody. Briefly, that perspective rests on the following concepts. A couple that comes together to form a family and raise children creates for those children something that is more than the sum of its parts—more than the dyadic relations one-on-one with mother and separately with father. We find no evidence for the existence of a single "psychological parent" with whom the tie is critically more important than with the rest of the network.

The relationships with mother and father, and with grandparents and others as well, constitute an emotional universe that, especially in the early years, forms a pattern for the child's later relations. If, in the crisis of divorce, one part of that

universe is cut off, labeled as bad, and becomes unavailable, there will be adverse consequences for the child's view of himself and of the people he will relate to later in life.

Even if the person who is cut off is a very ambivalently held parent with whom contact is difficult and painful, our experience and the evidence convince us that the later ability to put that relationship in emotional perspective is better served through contact than through separation.



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tualize himself as a developing person, he must identify himself with two parents—a man and a woman, a father and a mother. If he is exposed to only one parent in his day-to-day living, he will inevitably invent the other in his mind. He will ask many questions, will try in all ways to get some feeling and information about his absent father or mother. If this is not forthcoming, he will in his fantasy create the parent he needs in order to feel good about himself as a person. If parents have not resolved their own feelings about each other, this process in the child will reawaken old feelings, angers, regrets, longings and whatever else is still there.

Children need some positive information about both parents and about the attitudes of the parents toward them and to each other. For purposes of building their own sense of self and self-respect, they need to know the assets and good qualities of each of their parents as well as those facts that led to ways in which their parents have failed them. They want to know what attracted the parents to each other, what each liked in the other. And although their larger understanding of why the parents separated will come as they become older, children have a need to know why their parents were divorced.

Consider the example of a nine-year-old boy whose divorced father is living away from home. He sees his father fairly regularly and likes many things about him. If he feels that his mother has strong feelings of rejection for his father and feels only negatively about him, he may have difficulty in identifying with his father. As a boy, he needs to like his father in some ways, but if he feels his mother totally rejects his father, he may begin to feel that his mother cannot really accept him either. Since he likes his mother and is dependent upon her for affection and acceptance he finds himself in conflict about his loyalties.[3]

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relationship. Consider the example of the child who saw the impact of her father's violent behavior prior to the divorce, but who said thoughtfully, "maybe when we go visit Dad, if we keep him company, he will lose his violence."[3] We would urge an awareness of the child's concern for the parent's welfare, even when that parent seems to fail by ordinary social criteria. Without such awareness, the law, in its concern for protecting the child, may in fact make the child pay the heaviest price.

Providing access to both parents helps both child and parents deal with feelings that are evoked if the child looks like, is named for, or reminds the custodial parent of the divorced spouse. Since the divorced spouse has been rejected, the child may be vulnerable to anxieties about being abandoned or rejected himself. If, however, the non-custodial parent is accessible, the child will benefit from that parent's support and the consequent affirmation of his own identity.

The values that come from the child's having access to the love and care of both parents make divided or joint custody attractive options for consideration in some cases. The difficulties the parents have in their relationships with each other can provide a potential for growth in the child, if their differences do not jeopardize their love for him/her, and the child can recognize that. In addition, as previously noted, there is evidence that early loss of a parent correlates with the incidence of depression later in life.[4] It is worthwhile to strive for a custody determination that circumvents this sense of "loss" by keeping both parents within the child's milieu.

To quote from the Group for the Advancement of Psychiatry's report on parenthood:

> Despite the fact that one parent can rear children and meet their physical needs, children need two parents for complete psychological growth and development. What this means is that in order for the child to concep-

a child may be as detrimental to the child's development as or who cannot *give* love.

3. The history of mental illness in a parent does not in itself preclude effective parenting.

Custody awards made on the basis that one parent is "unfit have derived in part from the diagnosis of psychiatric problem in the "unfit" parent. We frequently observe, however, that the family member initially referred for psychiatric help is not necessarily the "sickest" family member, but is, instead, part of a complex interactional system. A judgment concerning the unfitness of one parent in isolation from the context of the whole family is a fragmentary and possibly unreliable judgment. Frequently, what is seen as ill or pathological behavior is determined by the nature of the repeated interactions in a family. Individually or in another situation, the "sick" member may not exhibit the same maladaptive behavior. Furthermore, a judgment made on the basis of a present or past diagnosis of mental illness does not by itself establish the bearer as an unfit custodian of the child. The issue is how the emotional disturbance affects the interaction with the child.

While the award of custody should not automatically be made against the parent with a mental illness, it should not be made solely because the child can be demonstrated to support the mental health or welfare of one parent. Also, it should be noted that a kind of "Gresham's Law" tends to operate in these situations over time: the more healthy parent tends to give in to the less healthy one; the more flexible parent to the more rigid one; the one who wants the divorce more urgently, to the one who is not immediately eager.[8] It is important, therefore, that there be some monitoring during the negotiation so that distorted compromises between parents and the use of the child as a pawn can be averted.

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It is sometimes supposed that an interested and sympathetic stepparent can replace the child's non-custodial parent and therefore obviate the need for contact with that parent. While acknowledging the substantial role that stepparents may play in the emotional development of children, we wish to emphasize that a child's loyalties to a stepparent and to a natural parent are different and separate. The presence of a stepparent should in no way be viewed as eliminating the need for the child's access to both his/her natural parents.

In emphasizing the importance of visitation by the non-custodial parent, it is useful to comment on the nature of that visitation. Often the non-custodial parent sees the child during a prearranged and generally short period of time; thus an ongoing responsible parenting role is not assumed by the non-custodial parent. The child is denied an opportunity to see the non-custodial parent in daily routines, while the custodial parent is seen in a variety of situations, including fatigue, irritability, and preoccupation with problems. Visiting arrangements that provide a better balance will enhance the child's perspective and facilitate the development of a more realistically based relationship. This requires planning time, space, and activities that foster the maintenance of the relationship between parent and child. A situation to be avoided is one like that of the father of a five-year-old boy, who found it necessary to fly to another city to see his son in museums, restaurants, and other public places because the court had restricted his visitation to short periods of time and had not allowed him to take the child to his own home.

There is no one overriding quality or competence that defines good or bad parenting. Competence in parenting represents a range of capabilities; there is no single, absolute trait against which contestants for custody can be evaluated. In our experience, for example, a parent who cannot *accept* love from

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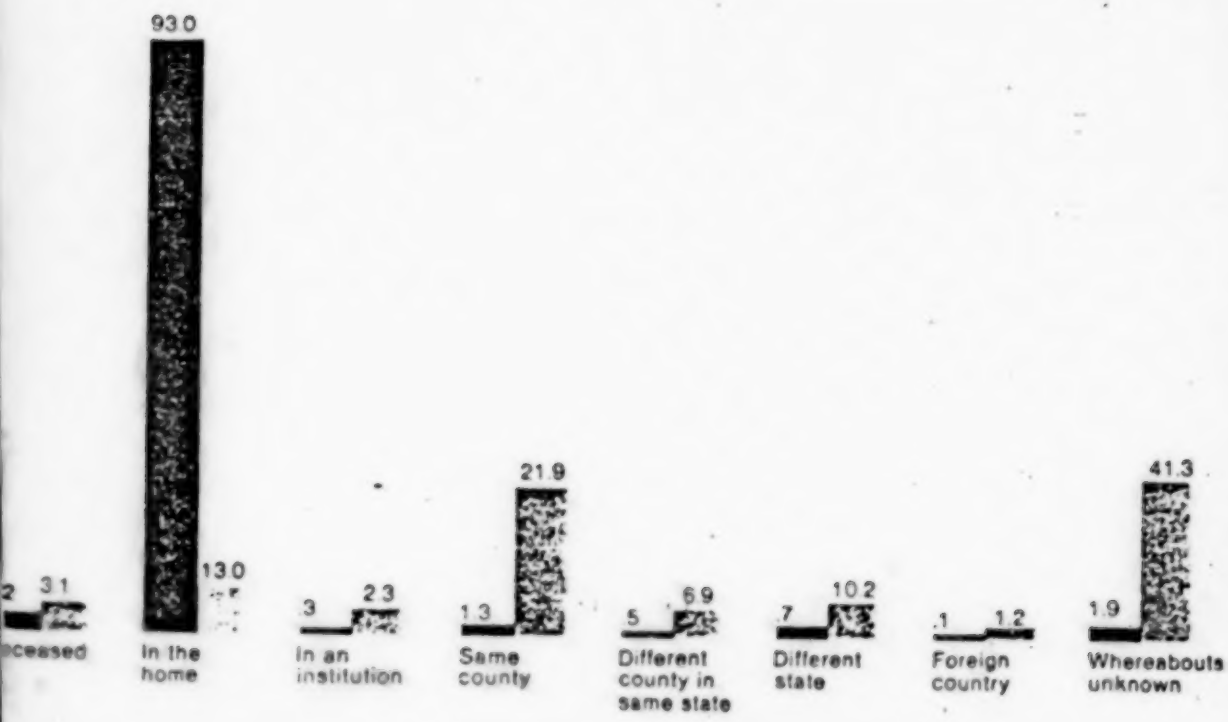
Almost all AFDC children lived with their mothers

Ninety-three percent of AFDC children lived with their mothers. Only 13 percent had fathers at home in 1977, down from 20 percent in 1967. The whereabouts of 41 percent of the fathers was unknown. Few children were orphans.



Mother

Father



sidence of AFDC parents

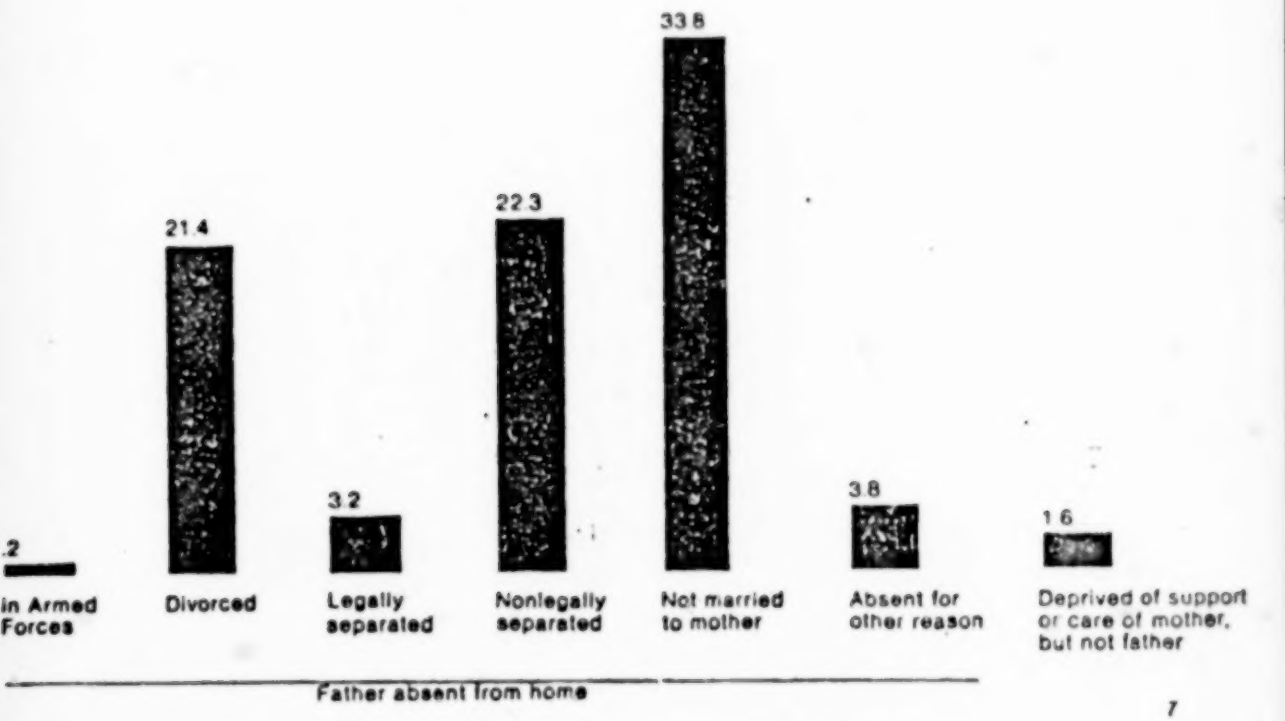
Neither in the home nor in an institution, but in:

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Children who received AFDC usually did so because their fathers did not live at home and provided little or no support

Eighty-five percent of AFDC children had no father at home. Almost 50 percent had parents who were divorced or separated. Another 34 percent had parents who were not married to each other. A small number of the children had fathers who were absent because of service in the Armed Forces. Of the 13 percent who had fathers at home, 54 percent had disabled fathers, 46 percent unemployed fathers.



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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHELLE M. ETLIN	)	
	)	
Complainant and	)	
Cross-Defendant	)	
	)	
v.	)	In Chancery No. 68775
	)	
VLADIMIR N. ETLIN	)	
	)	
Defendant and	)	
Cross-Complainant	)	

DECREE OF DIVORCE A VINCULO MATRIMONII

THIS CAUSE came on to be heard, the Honorable William G. Plummer presiding, on the Bill of Complaint; upon defendant's Answer and Cross-Bill of Complaint; upon the testimony of Complainant and her witnesses duly taken in support of her Bill of Complaint and upon the testimony of defendant and cross-complainant and his witnesses duly taken in support of his Cross-Bill of Complaint; all before Douglass S. Mackall, III, Commissioner in Chancery; upon the Report of said Commissioner, which Report is filed herein; and upon the exceptions to the Commissioner's Report, filed by the defendant and cross-complainant; and upon motions docketed by the complainant and cross-complainant for hearing the 28th day of October, 1981.

UPON CONSIDERATION WHEREOF, and it appearing to the Court, independent of the admissions of either party in the pleadings or otherwise, that said parties were lawfully married on November 3, 1976 in the State of New York; that one child was born of the aforesaid marriage, namely, Daniel Etlin, born January 20, 1978; both parties are members of the Caucasian race, over the age of eighteen years, and neither party is a member of the Armed Forces of the United States; both parties were, at the time of the filing of this action, bona fide residents and domiciliaries of the

Commonwealth of Virginia for greater than six months next preceding that date; this Court has jurisdiction to hear and determine the issues in this cause; the parties hereto last cohabited as husband and wife in Fairfax County, Virginia, at the address of 7403 Lisle Avenue, Falls Church, Virginia; that the parties have lived separate and apart, without any cohabitation and without interruption from February, 1980, to the present; the parties intended to live separate and apart after February, 1980; there is no possibility of a reconciliation between the parties; that defendant and cross-complainant Vladimir N. Etlin's Exceptions to the Commissioner's Report should be overruled; that complainant and cross-defendant Michelle M. Etlin's motion for entry of a judgment for arrearages in child support and entry of a decree of divorce a vinculo matrimonii should be granted; that defendant and cross-complainant Vladimir N. Etlin's motions for a continuance pending complainant's production of certain bank statements and checks not in her personal possession at defendant's expense due to her failure to comply with the court's earlier decree should be granted; and that the other motions of the parties, including complainant's motions for an award of spousal support pursuant to §20-107 of the Code of Virginia and for an award of counsel fees and costs, and defendant's motions to reduce child support, for an award of Comissioner's fees, court reporter's fees and costs should be continued to a future date; and that defendant should be awarded a portion of the court reporter's fee for the October 28, 1981 hearing; it is hereby

ADJUDGED, ORDERED and DECREED that defendant's Exceptions to the Commissioner's Report be and are hereby overruled; and that complainant and cross-defendant, Michelle M. Etlin, be and she is hereby awarded a final decree of divorce a vinculo matrimonii from the defendant and cross-complainant, Vladimir N. Etlin, on the

ground that the parties have lived separate and apart without any cohabitation and without interruption since February, 1980, and the bonds of matrimony heretofore existing between the parties are forever dissolved; and it is further

ADJUDGED, ORDERED and DECREED that the provisions of this Court's Order entered in this cause on February 26, 1981, relating to the care and custody of the parties' minor child, the provision of health insurance for said child, and parental visitation rights are hereby incorporated by reference without prejudice to defendant's pending motion for a change of custody; and it is further

ADJUDGED, ORDERED and DECREED that the defendant and cross-complainant, Vladimir N. Etlin, is in arrears of One Thousand Two Hundred Dollars ($1,200.00) in child support payments from May, 1981, to and including October, 1981, and complainant and cross-defendant, Michelle M. Etlin, be and she hereby is awarded a judgment against defendant in the amount of One Thousand Two Hundred Dollars ($1,200.00), in addition to the judgment previously entered in this cause by The Honorable F. Bruce Bach, granting complainant a judgment against the defendant in the amount of Two Thousand Twenty-three Dollars and Forty-five Cents ($2,023.45), which judgment presently remains unsatisfied; and it is further

ADJUDGED, ORDERED and DECREED that complainant and cross-defendant, Michelle M. Etlin, shall inquire as to the availability and cost of obtaining copies of her bank statements and checks not in her personal possession, which items shall be identified by defendant in a list furnished to complainant; that complainant shall endeavor to obtain for defendant, from the banks possessing them, copies of said statements and checks after defendant has paid the amount requested by said banks to locate and copy said documents; that should the actual costs of obtaining said copies exceed said banks' estimated costs, defendant shall promptly pay

such excess and should said actual costs be less than the estimated cost paid by defendant, defendant shall promptly be repayed such unused payment; and it is further

ADJUDGED, ORDERED and DECREED that the complainant and cross-defendant, Michelle M. Etlin, be and it is hereby ordered to pay the court reporter's fee for reporting the first portion (approximately 45 pages of transcript) of the October 28, 1981 hearing, concerning defendant's motion for production by complainant of bank statements and checks not in her personal possession; and it is further

ADJUDGED, ORDERED and DECREED that this case shall remain on the docket so that further motions of the parties, including defendant's motions to reduce child support, for an award of Commissioner's fees, court reporter's fees and costs, and including complainant's motions for spousal support consisting of periodic payments and/or a lump sum payment pursuant to §20-107 of the Code of Virginia, for defendant's motions for spousal support for an award of counsel fees, expenses and costs, as well as any other matters remaining to be decided in this cause can be heard at a later date and the jurisdiction of the Court to adjudicate the said motions and matters is hereby expressly reserved; that any such further decree concerning spousal support or child support shall be effective as of the 28th day of October, 1981.

AND THIS CAUSE IS CONTINUED.

ENTERED this 16th day of ~~November~~ February, 1982

THE HONORABLE WILLIAM PLUMMER,
JUDGE
Circuit Court for the County
of Fairfax, Virginia

Seen and Exception noted to Court's orders that complainant produce copies of documents not in her personal possession and that she pay a portion of the court reporter's fee:

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331-7120
Counsel for Complainant and
Cross-Defendant Michelle M. Etlin

Seen and Exception noted to Court's order overruling defendant's Exceptions to the Commissioner's Report:

Subject to the wording and substance of this Final Order.

VLADIMIR N. ETLIN
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684-6607
Defendant and Cross-Complaint,
Pro Se

Office - Supreme Court, U.S.
FILED
JUN - 7 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-6629

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM 1981

VLADIMIR N. ETLIN,

Petitioner

v.

CHARLES S. ROBB,

Governor of Virginia;

GERALD L. BALILES,

Attorney General of Virginia;

and

LEWIS H. GRIFFITH,

Circuit Court Judge for the Nineteenth Judicial Circuit of Virginia;

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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NO. 81-6629

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM 1981

VLADIMIR N. ETLIN,

v.

CHARLES S. ROBB, etc., *et al.*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

QUESTION PRESENTED

DID THE DISTRICT COURT PROPERLY ABSTAIN FROM EXCERCISING JURISDICTION OVER THIS CASE INVOLVING DOMESTIC RELATIONS LAW, WHERE STATE LAW PROVIDES THE PETITIONER AN ADEQUATE OPPORTUNITY TO PRESENT HIS CONSTITUTIONAL CLAIMS IN AN ONGOING STATE PROCEEDING?

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INTRODUCTION

Vladimir N. Etlin has petitioned the Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. He asks this Court to review the Court of Appeals' decision affirming an order by the United States District Court for the Eastern District of Virginia, Alexandria Division. The District Court dismissed Etlin's complaint on abstention grounds. The complaint alleged that various provisions of Virginia's domestic relations law, and actions taken under that law in a custody and child support proceeding, deprived Etlin of his civil rights. This brief presents the reasons why this Court should not review the case. Rule 22.1 of the Rules of the Supreme Court of the United States.

REPORTS OF DECISIONS BELOW

None of the decisions below have been reported. The citations of those decisions are as follows:

1. *Etlin v. Dalton, et al.*, No. 81-0257-A (E.D. Va., Alexandria Div., July 10, 1981) [Order of the District Court.]
2. *Etlin v. Dalton, et al.*, No. 81-1760 (4th Cir. December 30, 1981) [Per Curiam Opinion by the Court of Appeals.]
3. *Etlin v. Dalton, et al.*, No. 81-1760 (4th Cir. February 2, 1982) [Order by the Court of Appeals denying Petition for Rehearing.]

JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction to consider this Petition under 28 U.S.C. §§ 1254(1) and 2101(c).

Etlin's certificate of service indicates that he desires to proceed in this Court *in forma pauperis* under Rule 46 of the Supreme Court Rules. Petitioner has not, however, complied with the Rule. Respondents were served with neither his motion for leave to proceed *in forma pauperis* nor his supporting affidavit, as required by U.S. Sup. Ct. Rules 46.4 and 28. Respondents have no way of knowing whether Etlin comes within the requirements of 28 U.S.C. § 1915. Therefore,

Respondents object to Petitioner proceeding *in forma pauperis*. If Etlin does not desire to proceed *in forma pauperis*, Respondents object to the form of his petition for writ of certiorari.

APPLICABLE PROVISIONS OF LAW

Etlin refers the Court to several constitutional and statutory provisions which he says are involved. He relies on these provisions to argue that Virginia's child custody and support laws are unconstitutional.

At this stage of the proceedings, however, the only issue is whether the lower courts properly applied the federal abstention doctrine. The District Court and Court of Appeals determined that Etlin's constitutional claim could have been resolved in the ongoing custody and support proceedings in state court.

The pertinent provisions of state law concerning custody and maintenance proceedings are set out below:

> Va. Code § 16.1-242 (1981 Cum.Supp.)
>
> When jurisdiction has been obtained by the court in the case of any child, such jurisdiction may be retained by the court until such person becomes twenty-one years of age, except when the person is in the custody of the Department or when jurisdiction is divested under the provisions of § 16.1-244.
>
> Va. Code § 20-108 (1975 Repl.)
>
> The court may, from time to time after decreeing as provided in the preceding section (§ 20-107), on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.

Va. Code § 31-17 (1979 Repl.)

> No such order or orders touching the custody of the child or children or the access of either parent thereto shall be made, except upon reasonable notice to the father or mother or other person having custody of the child or children. At any time after making any such order or orders the court of judge in vacation, for good cause shown, may vary, modify or annul same.

STATEMENT OF THE CASE

On February 26, 1981, the Honorable Lewis H. Griffith, Judge of the Circuit Court for the County of Fairfax, Virginia, entered an order awarding custody of Petitioner's son, Daniel Etlin, to Petitioner's ex-wife, Michelle Etlin. The order also awarded child support to Ms. Etlin. On March 17, 1981, Petitioner brought this civil action in the United States District Court for the Eastern District of Virginia, Alexandria Division. He named as defendants John N. Dalton, then Governor of Virginia; J. Marshall Coleman, then Attorney General of Virginia; and Judge Griffith.[1]

The complaint alleged that Petitioner had been deprived of his rights under the First, Fifth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Jurisdiction was asserted under 28 U.S.C. §§ 1343(3), 2201, 2202 and 42 U.S.C. § 1983.

The Defendants moved the District Court to dismiss Etlin's complaint. In an order dated July 10, 1981, the District Court abstained from hearing the matters raised by the complaint and dismissed the action without prejudice. The basis of the District Court's decision was that "the constitutional questions raised in this action may be raised in the pending State court action." On appeal to the Fourth Circuit Court of Appeals, that order was affirmed in a *per curiam* opinion rendered December 30,

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[1]Charles S. Robb and Gerald L. Baliles are now the Governor and Attorney General of Virginia, respectively, and Etlin has named them as Respondents before this Court as the true parties in interest.

1981. Etlin's petition for rehearing was denied on February 2, 1982. He has petitioned this Court for a writ of certiorari to review the decisions of the Court of Appeals.

SUMMARY OF ARGUMENT

The lower courts were competent to interpret Virginia's domestic relations law, and their interpretation does not require review by this Court. Abstention based on that interpretation was entirely proper under the decisions of this Court, especially in light of the traditional state authority over domestic relations. Consequently, the case is not one which this Court should review for "special and important reasons," Rule 17, and the petition should be denied.

ARGUMENT

A.

THE LOWER COURTS' INTERPRETATION OF VIRGINIA LAW SHOULD BE ACCEPTED

The lower federal courts interpreted Virginia law to allow state court modification of child custody determinations and support orders at any time. This interpretation involved only questions of state law and should be followed by this Court. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 462 (1967). Where the application of federal law depends on the proper interpretation of state law by the lower federal courts, that interpretation should not be overturned unless it is clearly erroneous. *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959).

B.

THE LOWER COURTS PROPERLY ABSTAINED

The doctrine of abstention requires Etlin to litigate his federal constitutional claims fully in pending state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). In this

case, Etlin sought redress from an Order of the Fairfax County Circuit Court entered on February 15, 1981. The order entered by Judge Griffith is subject to modification upon proper application to the court. Va. Code. §§ 20-108, 31-77 (1975 Repl. & 1979 Repl.). It is therefore clear that there was an ongoing state court proceeding at the time Etlin filed his complaint which, indeed, remains ongoing.[2]

Under the *Younger* doctrine, whenever declaratory and injunctive relief is available to the plaintiff in an ongoing state court proceeding, the federal court is bound to apply equitable estoppel, and dismiss the action by requiring the plaintiff to present "all claims, both state and federal, to the state courts." *Gibson v. Berryhill* 411 U.S. 564, 577 (1973). Admittedly, *Younger* involved a state criminal prosecution, but its rationale has since been extended to apply to state civil proceedings. *See Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977).

The underlying basis for federal abstention rests upon federal judicial respect for the various state functions. Each state and its institutions should be free from federal interference so that they can effectively perform their local functions. *Juidice v. Vail*, *supra*, at 334. In the case at bar, Etlin seeks federal court intervention into ongoing state court proceedings involving a matter of domestic relations. Child custody and child care are matters traditionally governed by state law. *Sosna va. Iowa*, 419 U.S. 393, 404 (1975). *See also Moore v. Sims*, *supra*. It would be inconsistent with the principles announced in *Younger* and its progeny to permit a disgruntled spouse to relitigate his state child custody and child support case in federal court. Such a course of action would unduly interfere with the legitimate functions of the State.

Etlin claims that his case falls within one of the exceptions to the *Younger* doctrine. His contention that there is no ongoing state proceeding is refuted by the express terms of applicable statutes and was rejected by the lower courts. He argues also

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[2]Although Etlin's custody proceeding occurred in the circuit court, a court of record, custody orders are also subject to modification in Virginia's courts not of record. Va. Code § 16.1-242 (1981 Cum. Supp.).

that the state court proceedings were conducted in bad faith with an intent to harass and that the challenged statutes are flagrantly and patently unconstitutional.

With regard to the first contention, the bad faith exception was created to protect the citizenry when the *government* brings a criminal prosecution solely to harass. This exception simply is not applicable to the facts in this case. There is not, nor could there be, any allegations in Etlin's complaint either that the action in the Fairfax County Circuit Court was brought by the government, or that it was brought in bad faith with an intent to harass.

With regard to the second contention, there is no allegation in the complaint that any Virginia statute is facially unconstitutional. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), the Court stated what a plaintiff must show to invoke this exception to the *Younger* doctrine:

> [The challenged statute must be] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

Under this rigorous test, the Virginia domestic relations statutes clearly are not statutes that are patently unconstitutional. To the contrary, they are gender neutral regarding matters of custody, maintenance and support.

Petitioner's remaining contentions are groundless. Only extraordinary circumstances allow federal intervention in ongoing state proceedings. *Moore v. Sims*, *supra*, at 430; *Simopoulos v. Virginia State Board of Medicine*, 644 F.2d 321, 327-28 (4th Cir. 1981). No such extraordinary circumstances exist here. Accordingly, abstention was proper.

CONCLUSION

The lower courts were clearly correct. They correctly applied the federal abstention doctrine, declining to interfere in domestic relations cases. They observed the appropriate deference to ongoing State proceedings in which Etlin can raise his constitutional claims. The District Court correctly abstained, and the Court of Appeals properly sustained the ruling.

The petition should be denied.

Respectfully submitted,
CHARLES S. ROBB, *et. al.*

By: John A. Gibney, Jr.
Counsel

Gerald L. Baliles
Attorney General of Virginia

William G. Broaddus
Chief Deputy Attorney General

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NO. 81-6629

IN THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM 1981

VLADIMIR N. ETLIN

v.

CHARLES S. ROBB, etc., *et al.*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

ENTRY OF APPEARANCE ON BEHALF OF RESPONDENTS

I, John A. Gibney, Jr., an Assistant Attorney General of Virginia and member of the Bar of this Court, will represent the Respondents Charles S. Robb, Gerald L. Baliles, and Lewis A. Griffith in the proceedings before this Court.

John A. Gibney, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of June, 1982, three copies of the foregoing Brief in Opposition and Entry of Appearance were mailed, postage prepaid, to Vladimir N. Etlin, 7403 Lisle Avenue, Falls Church, Virginia 22043.

John A. Gibney, Jr.
Counsel for Respondents

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NO. 81-6629

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

VLADIMIR N. ETLIN

APPELLANT

v.

CHARLES ROBB
GERALD BAILES
LEWIS GRIFFITH

APPELLEES

APPELLANT'S RESPONSE TO THE APPELLEES' BRIEF IN OPPOSITION

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1/

REPORTS OF DECISIONS BELOW

Appellees misinform this Court stating that the decisions of the District Court and Circuit Court have not been reported.

Appellant reported those decisions in his Petition on pages: i (Opinion below); 1 (Jurisdiction); and 5.

JURISDICTION OF THE SUPREME COURT

Appellant mailed his motion for leave to proceed in forma pauperis and his Supporting affidavit together with the Petition for Writ of Cerciorari to the Appellees by certified mail on May 3, 1982. The receipt is available.

APPLICABLE PROVISIONS OF LAW

APPELLEES intentionally failed to mention that ongoing custody and support statutes of Virginia have been invalidated by the Supreme Court of Virginia by making impossible reviewing of a case unless a material change of circumstanses is shown. See Appellant's petition, page 8, and Appendises 9,10. Besides one should not confuse ongoing jurisdiction of a state court with a pending state proceeding which might have justified application of the Younger doctrine. See Appellant's petition page 7. But there was no pending state proceeding at that time.

Moreover Appellees have silenced that both the District Court and Court of Appeals were wrong stating that Etlin's constitutional claim could have been resolved in state court. Because state court has no power for a declaratory judgement on a law of Virginia in addition to the futility of a redress to the Supreme Court of Virginia, because there is no automatic right for appeal in Virginia which constitutes a violation of Due Process of appeal.(Appellant's petition, page 22).

SUMMARY OF ARGUMENT

Appellees are incorrect equating domestic relations and substatial constitutional claims. See Appellant's questions presented for review.

ARGUMENT

A.

Appellant has raised substantial federal questions,not questions of state law, that is why federal court is proper forum for redress.

Appellees are incorrect stating that Etlin sought redress from an Order entered on February 15, 1981. That Order was entered on February 26, 1981. That Order was final and could have been changed only when material change of circumstances is shown (App. 9,10). Etlin has not asked this Court to modify that Order but raised substantial constitutional questions which state court is not in power to solve, and it is futile to ask the Virginia Supreme Court for a declaratory judgement.See page 6 of the Appellant's petition.

The fact that the Appellees, who hold the highest state offices, do not see any violation of the Appellant's civil liberties emphasizes the futility of a redress at state court.

Appellees are incorrect stating that Younger doctrine has been extended to state civil proceedings. See Huffman v. Pursue, Ltd. 420 U.S. at 604 and page 7 of the Appellant's petition. Unless Appellees agree with Appellant that depriving him of his child is cruel and unusual punishment which constitute " a penalty as great, if not greater, than a criminal penalty..." See H.R.Rep. No. 95-1386, p.22 and p.21 of the Appellant's petition.

But even in cases where Younger doctrine is applicable the exceptions to the doctrine were developed not for the purpose of interfering with the functions of the State, as Appellees insist, but to prevent violations of the Constitutional liberties by the State. Presence of the several exceptions to the Younger doctrine was shown clearly in the Appellant's petition (pages 5-26).

Appelles are wrong in stating that there is no allegation in the complaint that any Virginia statute is facially unconstitutional. Appellant did show that custody and support statutes are unconstitutional on its face and as applied. See Appellant's petition, page 9-10.

CONCLUSION

Appellant has presented substantial federal questions for review which can not be solved by state court.

The lower federal courts have failed to analize Appellant's petition in light of principles laid down in Younger and the abstention was wrong.

Appellant respectfully requests that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

V.ETLIN
APPELLANT, PRO SE

AFFIDAVIT OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's responce to the Appellees' brief in opposition was mailed, postage prepaid, this 15 day of June 1982, within the permitted time, to J.A.Gibney,Jr. Counsel for Appellees, at 101 North 8th St. Richmond, VA 23219

VLADIMIR ETLIN

Subscribed and Sworn to
before me this 15th day
of June 1982.

Notary Public

My Commission expires 3/12/84

END OF DOCKET